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MONTGOMERY COUNTY

LAW REPORTER,

CONTAINING CHIEFLY

REPORTS OF CASES

DECIDED BY

THE COURTS OF MONTGOMERY COUNTY,

TOGETHER WITH CASES ARISING IN SAID COUNTY DECIDED BY

THE SUPREME COURT OF PENNSYLVANIA,

FOR THE YEAR 1893.

VOL. IX.

REPORTED BY F. G. HOBSON AND A. H. HENDRICKS,
OF THE MONTGOMERY COUNTY BAR.

NORRISTOWN, PA.:

1893.

Rec. Nov. 12, 1876.

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Court of Common Pleas of Montgomery County.

AARON B. WOOD VS. COMLY WILLIAMS.

Parol evidence will not be admitted to set up a contract inconsistent with the terms of a promissory note, in the absence of an allegation of fraud, accident or mistake; and the parol agreement to be admissible must be the inducement for the execution of the writing.

Where the affidavit of defence shows there is something due, the admission must be clear as to the amount, so that judgment may be taken for a sum certain.

An averment of set-off must be certain and precise as to time.

RULE for judgment for want of a sufficient affidavit of defence.
No. 223, October T., 1892.

Henry Freedley, Jr., Esq., for plaintiff.

George N. Corson, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., December 5, 1892.

The plaintiff brought suit on a promissory note for sixty dollars at sixty days, made by the defendant and payable to the plaintiff's order. The balance of the claim consists of a book account amounting to \$3.57. According to the itemized bill in plaintiff's statement he furnished meats to the defendant to the value of \$3.57 after the note in suit was given.

The affidavit admits the giving of the note upon the day of its date. At that time the plaintiff demanded sixty dollars; this amount he claimed was due him for goods sold and delivered to the defendant. According to the affidavit, the defendant "disputed the correctness of plaintiff's bill." He gave the note "under protest and under a solemn promise, and upon consideration of the solemn promise made by plaintiff that he would furnish the defendant with an itemized bill of the account." * * * He "declared he would not pay the note until he was shown an itemized account, and was as-

sured and convinced that it was correct and just"; that the plaintiff "accepted the note with that distinct contract and agreement." The affidavit further alleges that no bill of items was furnished according to the agreement.

The defendant admits that he owes the plaintiff "a bill amounting to something less than forty dollars, perhaps." He denies that he bought anything from plaintiff after the note was given; that "all of plaintiff's claim was included in the note."

The affidavit concludes: "Defendant has an offset to plaintiff's bill, amounting to \$12, for hay sold to plaintiff by defendant on the days and times set forth in the accompanying bill."

No such bill is attached to the affidavit, nor is it found among the papers.

Does this affidavit show a good defence to the plaintiff's claim or any part thereof?

The note is a written agreement to pay sixty dollars at the end of two months. The defendant now sets up a parol agreement that the note was not to be paid except upon the condition that he was convinced and assured that the amount was correct and just. If the plaintiff is not able to convince the defendant that the bill or note is just and correct, the note never becomes payable, although the defendant agreed to pay at the end of sixty days. Such parol testimony can not be received. The offer is similar to that in *Meily vs. Phillips*, 16 W. N. C., 429, where the defendant was not to pay the note until he collected the money upon a certain other note. Or the offer is like that made in *Clarke vs. Allen*, 132 Penna. St. R., 40, where the note was to be paid when the defendant could spare the money from his business. Such testimony against a written instrument is not admissible, because it changes the legal effect of the note and contradicts its very terms.

The offer to show that the note was not to be payable until the plaintiff furnished a bill of items, must be excluded for the same reason. It is an offer to show that the promise to pay though absolute was in fact but conditional. There was no occasion for any contingency; the obligations of the parties were fixed at the time the note was given. How much the defendant owed the plaintiff did not depend upon any future event or circumstance. This is not the case of a note given for the value of an article which is to show fitness or durability upon future trial. In the present case, at the time the

Wood vs. Williams.

note was given the defendant had received all the consideration; he knew or ought to have known the extent of his indebtedness. In *Garsed vs. Ritter*, 2 Cent. R., 800, judgment was entered for plaintiff, although the affidavit of defendant alleged that the note was given as evidence of what the plaintiff was to receive for certain work to be done but not to be paid until the services were rendered; the work, the securing of certain patents, was not done at the time the suit was brought.

The offer of parol evidence to be competent must show fraud, accident or mistake at the time of the execution of the writing. This is always true where it is sought to set up a contract inconsistent with the terms of the writing: *Martin vs. Berens*, 67 Penna. St. R., 459; *Coughenour vs. Suhre*, 71 Id., 462. In the latter case the defendant offered to show that he was not to pay the note "until he got his money from the bridges."

Again, the defendant does not say that he "was inveigled" into signing the note by means of the promise that a bill of items would be furnished. It is true that he says he gave the note upon consideration of a solemn promise, but whether he was induced to sign the note because he owed some money and wished to accommodate the plaintiff as he alleges, or because of the promise of a bill of items, is not clearly set forth. The parol agreement must be the inducement for the execution of the writing before it is admissible: *Thorne et al. vs. Warfflein*, 100 Penna. St. R., 526.

The allegation that the "plaintiff requested the note as an accommodation to get the money out of bank" does not help the defendant. When he speaks of the "note as an accommodation" he does not use the term in the sense that is ordinarily given to the words—"accommodation paper." This is apparent from the reading of the whole affidavit. The defendant means that he gave the note for sixty dollars before he was fully satisfied that he owed that much, and that he did this to accommodate the plaintiff.

But if the defendant may introduce his parol evidence, we do not see how it can help him in connection with the other parts of his affidavit.

If the affidavit, so far as it relates to the promises in parol, means anything, it can mean no more than this—that the defendant is not to be estopped from showing the amount due on the note because he agreed to pay sixty dollars; that is, he may still show that the note

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is good only for the true amount of his indebtedness at the time the note was given. The taking of the note can not prejudice the plaintiff's claim as it stood before the note was executed.

The only defence offered is the statement that the claim is too large; that there is due "something less than forty dollars, perhaps." This admission is too vague. If he can only guess at the amount due, how can he swear that the whole demand is incorrect? If he can not tell the true amount due, how can we enter judgment for any particular sum less than the face of the note? Perhaps the defendant owes but forty dollars; perhaps he owes the whole claim. There should be a clear admission as to the amount due: *Griel vs. Buckius*, 114 Penna. St. R., 187.

The averment of set-off is not precise and certain as to time. No day or date is given. We can not allow the claim: *Marklèy vs. Stevens*, 89 Penna. St. R., 279.

The allegation that "this defendant denies that he ever bought anything from plaintiff after he gave the note," may be evasive. The charge was for necessities, and they may have been purchased by the defendant's wife or his servants and used by his family. He does not deny that the meats were received for him or delivered to the family.

And now, December 5, 1892, rule for judgment is made absolute.

HENRY E. ELSTON VS. W. U. JURY ET AL.

A mechanics' lien filed under the act of May 18, 1877, and which does not on its face aver notice to the owner of the intention to file a lien, or that the work was about the alterations and repairs, etc., can be amended in these respects at any time before trial.

MOTION to strike off lien and to amend. No. 10, March T., 1892.
Freas Styer, Esq., for plaintiff.

Holland & Dettra, Esqs., for defendants.

Opinion of the court by WEAND, J., December 5, 1892.

It is objected to this lien that it does not aver that the claimant gave notice to the owner or reputed owner of the property of his intention to file a lien; nor does the lien show that the materials were

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furnished or that the work done was during the erection or construction of, or in and about the repairs, alterations or additions to the house or building against which it is filed. The claimant now moves to amend in this respect.

We are of opinion that the lien is amendable. The proceedings are under the act of 18th May, 1887, P. L. 118, which extends the act of May 1, 1861, entitled "'A supplement to an act relating to the lien of mechanics and others upon buildings,' approved June 16, 1836," to all the counties of this commonwealth. The act provides that "to entitle any one to the benefits of this act, he shall give notice to the owner or reputed owner of the property, or his or her agent, at the time of furnishing the materials, or performing work in and about the repairs, alterations or additions to any house or other building, of his intention to file a lien under the provisions of this act." As the act of 1887 does not provide what the lien shall contain, we must turn to the act of 1836 to ascertain what is necessary. It is not by that act required to give notice or to aver notice in the lien. There are various facts necessary to be proven before a recovery can be had on an ordinary lien which are not necessary to be averred therein.

If, therefore, this case had been submitted to a jury, and notice had been proven, we think the want of averment of such notice in the lien would be no objection to a recovery. In this respect it differs from a failure to name a contractor, to describe the buildings, etc., because the act requires these facts to be set forth in the lien.

On a motion to strike off a lien, or on a demurrer to its sufficiency, we are called upon to decide whether upon the face of the lien all the facts appear to entitle the claimant to recover; and if they do not, the lien can be stricken off. In this case, if we had nothing before us but the lien and the motion to strike off, we would make the rule absolute; but the claimant having asked to amend, we think his request should be granted under the act of 11th June, 1879, P. L. 122. The giving of notice is essential to recovery; but as the law does not in terms provide that this shall be set forth in the lien, we think the failure to so aver it is but an irregularity which can be corrected. We can find no case in which the power to amend in this particular is denied; and if notice can be shown, no harm is done the owner, and the amendment will be "conducive to justice

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and a fair trial upon the merits," which was the object of the act of 1879.

And now, December 5, 1892, the motion to strike off the lien is overruled and the motion to amend is allowed.

IN EQUITY.

DAVID Y. MOWDAY VS. SAMUEL M. MOORE.

Title by adverse hostile possession is as good as any known to the law. That the claimant originally entered and occupied under a paper title which does not embrace the *locus in quo*, will not defeat his claim where he can show title by adverse user.

Where the defendant's admissions in evidence show a mistake in the conveyance made by him, a bill by the grantee, asking for the reformation of the deed, will be sustained.

EXCEPTIONS to report of the master. No. 10, March T., 1890.

Childs & Evans, Esqs., for plaintiff.

Larzelere & Gibson, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., November 7, 1892.

It is unnecessary to repeat the history of this case. Nor is it necessary to determine whether all the facts found by the master are sustained by the evidence. As we view the case, the facts necessary to sustain the plaintiff's case are not in dispute.

The plaintiff had a good title to all the ground occupied by him at the time of the agreement of sale with the defendant. His lot of fifty feet on Main street may not have been located in strict conformity with the distances given in his record title. According to the record title the lot is located fifty feet south of Mill street and two hundred feet south of the Coates line. According to present measurements the lot was actually located but forty-six feet south of Mill street and about one hundred and ninety-six feet south of the Coates line. At the time the distances were fixed by the original grantor, John Freedley, he owned to Mill street. If at that time—that is, in 1833—the parties to the record deed located the lot on the grantor's premises four feet nearer Mill street than it should have been located, as indicated by the present measurements, but such mistake can not defeat the plaintiff's title to the ground actually occupied by Freedley's

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grantee. Whatever title Freedley's grantee acquired was conveyed to the plaintiff, for the deed so declares; and the testimony is uncontradicted that the occupancy of plaintiff and Freedley's grantee, who was also plaintiff's grantor, is one and the same.

Defendant owned the corner lot between Mill street and plaintiff's fifty feet lot. He purchased from Heebner, who had purchased from Freedley in 1839—that is, after the conveyance from Freedley to plaintiff's grantor. Prior to the Heebner purchase from Freedley a wall was built marking the northwestern boundary of the plaintiff's lot—that is, it formed the division line between the lot sold by Freedley and the lot retained by him. This wall was built about 1835. That it stood there in 1842 can not admit of any doubt. Matthias, Freedley's grantee, occupied up to this wall. His coal sheds stood on the wall. The wall was one hundred and fifty feet long, and from the end of the wall back to Lafayette street the division line was marked by a fence. This wall still stood in 1871, when the plaintiff bought from Matthias; and when the plaintiff pulled down the old buildings, the new structure extended to this division wall. This old wall formed the foundation wall for the northwestern side of the new building. The plaintiff, therefore, occupies the same ground that was in the use and occupancy of his grantors. The four feet now claimed by defendant and the title to which defendant claims is in dispute, were in the continuous, adverse, exclusive and notorious possession of the plaintiff, and those under whom he claims, for fifty years. Against this position not a particle of evidence is offered. Such a title by adverse and hostile possession is as good as any known to the law: *Jones vs. Hughes*, 16 Atl. R., 849.

That the plaintiff's grantor originally entered and occupied under his paper title, can not defeat his claim. If the paper title does not embrace the *locus in quo* his adverse possession may be shown, and if proven save him: *McCombs vs. Rowan*, 59 Penna. St. R., 416.

The plaintiff has shown a good title to the four feet in question, and we find no evidence whatever upon which the defendant can base a dispute of title.

With this fact established there is no difficulty in the interpretation of the agreement of April 25, 1884. By this agreement the defendant undertook to sell to plaintiff a lot of ground having a frontage of twenty feet on Main street. There is nothing to indicate an intention to sell or buy a lot of sixteen feet. The subsequent deed

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shows an intention to convey a lot fronting twenty feet on Main street. The defendant says in his testimony: "I agreed to sell him twenty feet of the fifty feet I purchased. * * * No idea arose in my mind but that the fifty feet were there as I bought them."

When the parties went to the scrivener to have the deed drawn the defendant said: "I have fifty feet. I sold Mowday twenty feet."

Nor is there any dispute where the twenty feet so sold were located. Again, the defendant says: "Mowday was to have twenty feet of the fifty feet of ground—the south twenty feet of the southern part of the fifty feet bought of the Heebner estate." That is, the plaintiff was to have a conveyance of the twenty feet next to his own property.

How can there be any question as to the intention of the parties under such evidence? The plaintiff certainly did not intend to buy four feet of ground already owned by himself; and the defendant did not intend to sell any such four feet, for at that time, and for some time after, he admits he had no knowledge that his property extended beyond the then existing house line of the plaintiff.

The subsequent conduct also shows the intention of the parties. A line twenty feet from the plaintiff's house line—that is, twenty feet from the line of the old stone wall—was fixed as a division line after the conveyance. Each party built up to this line. The defendant offered to perfect the title upon the payment by plaintiff of half the costs of a survey. The letter of his counsel, as late as April 2, 1890, speaks of an imperfect title; and in this letter the defendant seems to seek an excuse for not doing that which he feels he ought to do. These are all subsequent acts; but they are admissions hostile to the claim now set up that the deed recorded expresses the true contract of the parties or the intention of the defendant at the time the deed was made.

But to all this the defendant answers, "True, it was my intention to give the plaintiff the twenty feet he now occupies; but I was laboring under two misconceptions at the time. I thought I owned fifty feet; and secondly, I did not know that the plaintiff already occupied four feet of my ground." These were after discoveries; and, as already shown, there is no foundation whatever for the pretended discovery that the plaintiff occupied any of the defendant's four feet. Suppose the defendant did think at the time the deed was executed that he owned fifty feet situate between the plaintiff's house line and

Murta et al. vs. Stephenson.

Mill street. How does this fact have any bearing upon the contract or show that the defendant did not mean to sell twenty feet? It may be that it shows that the defendant thought he was selling but twenty-fiftieths of it and not twenty-forty-sixths of it. But the parties were not contracting for the sale of any proportion of the whole lot. There was an absolute unqualified sale of twenty feet. The sale was not conditional upon the fact that the lot should hold out fifty feet. The parties saw the twenty feet located next to the plaintiff's existing property line, and these twenty feet were sold.

As the deed on record, according to actual surveys, seems to convey but sixteen of these twenty feet, there is a mutual mistake.

We have not discussed some of the questions raised by counsel for defendant; we do not deem it necessary. The careful report of the master is a sufficient answer.

In our view of the case many of the questions raised are not material. It will be observed that we have taken the defendant's admissions as sufficient to show the mistake set up in the bill asking for a reformation of the deed.

And now, November 7, 1892, the exceptions are dismissed. Let a decree be prepared and submitted for the reformation of the deed according to the prayer of complainant's bill, the costs of the proceeding to be paid by defendant.

JOHN P. MURTA, SAMUEL P. APPLETON AND JOHN L. APPLETON,
TRADING AS MURTA, APPLETON & CO., vs. ARTHUR H. STEPHEN-
SON, OWNER OR REPUTED OWNER AND CONTRACTOR.

Mechanics' lien—Amendment—Contractor can not be added after expiration of time for filing lien.

After the statutory period for filing a mechanics' lien has expired, an amendment introducing the name of a contractor will not be allowed, if the owner objects, even though the contractor consents.

MOTION to strike off lien and to amend. No. 10, March T., 1891.

Larzelere & Gibson, Esqs., for motion.

Charles Hunsicker, Esq., contra.

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Murta et al. vs. Stephenson.

Opinion of the court by WEAND, J., December 5, 1892.

The defendant's motion to strike this lien from the record does not assign any reason why this should be done. No depositions have been taken. We therefore are compelled to refuse the motion, reserving the right to take such action as may be proper on the trial of the cause when the facts are properly before us.

The lien is filed against Arthur H. Stephenson, owner or reputed owner and contractor, and the plaintiff now asks to amend the lien by adding the name of R. C. Lukens as contractor, and has filed with his petition the consent of said Lukens to be thus made a party to the proceeding.

The amendment having been asked for more than six months after the time limited for filing the lien, the case of Knox vs. Hilty, 118 Penna. St. R., 430, would be fatal to the application, if resisted by the party thus asked to be introduced. Does the consent of the contractor allow us to make the amendment when the owner objects? To avail himself of the privileges of the mechanics' lien law a claimant must bring himself within its provisions. The law requires that the lien shall set forth the name of the contractor where the contract of the claimant was made with such contractor, and it has been ruled that the omission to name such contractor is fatal to the lien: McCay's Appeal, 37 Penna. St. R., 125. And it was also ruled in the same case that a confession of judgment by the owner on such defective lien does not cure the omission to name the contractor as against lien creditors. The lien is bad, or rather no lien. To give it life and vitality by adding the name of the contractor is in effect filing a new lien after the statutory period has expired. That this is a wrong to the owner is manifest. His rights and that of the claimant are fixed at the expiration of the six months; and as the lien is then defective, his property is released so far as its liability on the lien is concerned. To allow a contractor to step in and make the owner's property liable is to deprive the owner of a right secured by law. If other lien creditors, who have no standing to object to the sufficiency of the lien other than that which the law gives when it says the lien is defective, because of the omission of the name of the contractor, can defeat such a lien or object to the owner's confession of judgment as against their liens, we do not see why the owner, who is more deeply interested, can not also object. Why is the position of the owner not as strong as that of the other creditors? It can

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make but little difference what the object of the Legislature was in requiring the name of a contractor to be added. Sufficient to say, they did so require it as a condition to the filing of the lien. It is fair to presume that it was done in the interest of the owner as well as for the protection of the contractor, and both are thus parties in interest, neither having the right to concede away the rights of the other. And if the penalty for such omission is that the lien shall fall, why shall one party more than the other relieve the delinquent claimant from the result? We are therefore of opinion that the lien can not be amended by adding the name of the contractor, but we will allow the motion so far as the bill of particulars is concerned.

And now, December 5, 1892, motion to amend by adding name of contractor overruled; motion to amend by adding bill of particulars allowed. The motion to strike off the lien is overruled.

 SUPERIOR NATIONAL BANK VS. JACOB L. STADELMAN.

Within the time allowed for filing an affidavit of defence plaintiff entered a rule to arbitrate, under which arbitrators were chosen before whom both plaintiff and defendant appeared. The defendant appealed from the award which was made August 30, 1892. Between the time of choosing and the meeting of the arbitrators the defendant filed his affidavit of defence. On October 5, 1892, plaintiff entered a rule on defendant to plead, and on October 27, 1892, he also entered a rule for judgment for want of a sufficient affidavit of defence. On the same day defendant filed his plea. *Held*, that plaintiff had waived his right to ask for judgment for want of a sufficient affidavit of defence.

Horner vs. Horner, 145 Penna. St. R., 258, distinguished.

SUR RULE for reargument. No. 84, October T., 1892.

Childs & Evans, Esqs., for plaintiff.

G. R. Fox & Son, Esqs., for defendant.

Opinion of the court by WEAND, J., December 12, 1892.

In this case a motion was entered for judgment for want of a sufficient affidavit of defence. No other objection to the entry of judgment was made by the counsel for the defendant than that the affidavit was sufficient to send the case to a jury. No reference was made to the record; nor was it produced in court. We had nothing before us but the statement, rule, and affidavit. Deeming the affi-

davit insufficient, we entered judgment for plaintiff. We afterward learned of the condition of the record, and of our own motion entered a rule for a reargument. Our reason for so doing is as follows: On July 15, 1892, plaintiffs filed their statement, and on the same day entered a rule of reference. Arbitrators were chosen before whom both parties appeared, with the result that there was an award in favor of plaintiff on August 30, 1892, from which the defendant appealed, making the customary oath and giving recognizance. Between the time of choosing and the meeting of the arbitrators the defendant filed his affidavit of defence. Pending the reference the defendant entered a rule for a commissioner to take testimony, and filed interrogatories. The plaintiff filed exceptions to the commission, and also cross interrogatories. After this, October 5, 1892, plaintiff entered a rule on defendant to plead; and on October 27, 1892, he also entered a rule for judgment for want of a sufficient affidavit of defence. On the same day defendant filed his plea, and the case was at issue. Our judgment was entered November 21, 1892.

The question now confronts us as to whether the plaintiff by his acts in entering the rule of reference and the rule to plead had not waived his right to judgment for want of a sufficient affidavit of defence.

In *Lusk vs. Garrett*, 6 W. & S., 89, the plaintiff entered a rule to have arbitrators chosen, who made an award in his favor, from which the defendant appealed. Afterwards the plaintiff's attorney signed a judgment in the Prothonotary's office for want of an affidavit of defence, and it was held that he could not do so, because the affidavit on the appeal was all that was required. In the opinion it was said: "We have two acts of Assembly, each intended to enable a plaintiff to get judgment sooner than by the course at common law. I incline to the opinion intimated by the present Chief Justice in 3 Serg. & Rawle, 250, viz., that if a man proceeds under one of these till he is thrown back to the ordinary course of law, he can not then go to and proceed under the other act."

In *Duncan vs. Bell et al.*, 28 Penna. St. R., 516, the syllabus reads: "When the cause is referred to arbitrators at the instance of the plaintiff, and an award is made in his favor, from which the defendant appeals, making the usual affidavit for that purpose, it is a waiver on the part of the plaintiff of the right to require an affidavit of defence." It is true that in *Horner vs. Horner*, 145 Penna. St. R.,

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258, Mr. Justice McCollum held that "the report of this case was misleading, because the only point decided was that the affidavit was filed in time." And yet upon a careful reading of the opinion it will be found that, to illustrate the point before the court, all the cases which ruled that such reference, etc., was a waiver, were cited approvingly, and that it was because such reference had removed the cause from court that the defendant was in time with his affidavit.

In *O'Neal vs. Rupp*, 22 Penna. St. R., 395, it was held that "it is too late to move for judgment on account of insufficiency in the affidavit of defence, after a rule to plead and plea entered, and rule to arbitrate entered on part of the plaintiff and stricken off, and nearly five months had elapsed before judgment asked for." In *Taggart vs. Fox*, 1 Gr., 190, the defendant had entered a rule to choose arbitrators before the time appointed by the rules of court for hearing motions for judgment, and afterwards, in due time, a rule of reference. The court set aside the rules and entered judgment in favor of plaintiff, etc. Judge Black said: "When a defendant arbitrates a case under such circumstances, it is irregular, and the proceedings under the rule of reference ought to be set aside. If the plaintiff had appeared and had taken part in choosing the arbitrators, or if he had gone before the arbitrators themselves, he would have waived his right to judgment for want of an affidavit." The plaintiff, however, relies upon the act of 14th May, 1874, P. L. 159. This act was intended to deprive the defendant of the right to refer without an affidavit, and the concluding sentence of the section "and a rule of reference shall in no case prevent the plaintiff from moving for or the court from entering judgment for want of a sufficient affidavit of defence" must be construed to mean that when nothing more than entering the rule has been done the case is not out of court and the plaintiff may still proceed under the affidavit of defence law. If the Legislature had meant more, they would no doubt have said so.

But if this was not a waiver of the right to take judgment, was not the entry of the rule to plead, after the affidavit of defence had been filed, an assertion on the part of plaintiff that he intended to pursue his action in the ordinary manner? On October 5, 1892, he enters a rule to plead in thirty days or judgment, etc.; and on the 27th of October also enters his rule for judgment because of the

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insufficiency of the affidavit of defence which had been filed August 30th, and a rule for a commission pending, the plaintiff having filed cross interrogatories and the commission issued. He did not move to create the commission, but by his acts led the defendant to believe that the merits of the case were to be gone into in the usual way.

In O'Neal vs. Rupp, 22 Penna. St. R., 395, it was held that "a party who intends to ask for judgment for the reason that the affidavit of defence is deficient, must do so before he has taken any steps in the cause, subsequent to the affidavit, calculated to mislead his opponent"; and that "the plaintiff, by his rule to plead and arbitrate, admitted the validity of the affidavit."

In Harner vs. Humphreys, 2 Miles, 28, "the plaintiff chose to treat the defendant as not in default, not only by not moving for judgment, but by asking and obtaining a plea from the defendant, which amounted to a waiver of his previous right, under the act, to have judgment." This case is on all fours with the one in hand. All that was decided in Horner vs. Horner, *supra*, was that a compulsory rule to plead by plaintiff was not a waiver. The court said "it may be conceded that the right to an affidavit of defence may be waived, but a mere notice to plead when required by the rule under which the appellant asked for a specific statement, is not a waiver," and then cites O'Neal vs. Rupp, 22 Penna. St. R., 395, approvingly.

We think, therefore, that, under the circumstances of this case, our judgment was improper, and had the defendant's counsel called our attention to the record, or made a defence on these grounds, we would not have entered judgment. Instead of calling our attention to the facts, he kept them to himself, and hence we were led into error.

And now, December 12, 1892, the judgment entered November 21, 1892, is set aside, together with all proceedings under it, and judgment for want of a sufficient affidavit of defence is refused for the reasons set forth in this opinion.

IN RE CONSHOHOCKEN WORSTED MILLS.

An assignee for the benefit of creditors of a corporation presented his accounts to a meeting of the stockholders and directors of the corporation, by whom they were approved "without filing in court or audit."

The assignee paid all the debts and still has a balance of money in hand, which the assignor corporation petitioned the court might be reconveyed to it. One of the stockholders then asked for a citation to compel the filing of an account in court. *Held*, that as the matter was within the discretion of the court, and as there was no charge of any improper conduct or mismanagement on the part of the assignee, no further accounting should be required.

An assignment for the benefit of creditors of a corporation does not necessarily work a dissolution.

PETITION for an account.

Charles Hunsicker, Esq., for petition.

James Boyd, Esq., contra.

Opinion of the court by WEAND, J., January 9, 1893.

The petitioner alleges that he is a stockholder and "person interested" in the Conshohocken Worsted Mills Company; that said company made an assignment for the benefit of its creditors to James Moir on April 13, 1889; that said Moir has never filed an account as assignee, and therefore praying that he may be compelled to do so. To this petition the assignee has filed an answer alleging a condition of affairs which he claims will excuse him from further accounting. The estate assigned consisted of both real and personal estate which has been converted into cash. All the known debts of the corporation have been paid, and the assignee has also paid to each stockholder \$20 per share. He still has in hand \$12,680.42.

The assignors have also filed a petition setting forth the above facts, and asking that the assignee be directed and allowed to reassign the estate still remaining in his hands to his assignor.

On the 17th of May, 1890, after due notice previously given, a meeting of the stockholders of the said assignor company was held at the said company's office, at which meeting thirty-two hundred shares of stock, out of the entire six thousand shares, were represented. At this meeting the assignee presented a statement and account, and produced all the books and papers relating to the assigned estate. After investigation a resolution was adopted, as follows:

1st. That said account be and it is hereby approved and accepted without filing in court or audit.

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2d. That the directors be requested, as soon as Mr. Moir shall have paid over the cash balance in his hands as assignee, to pay over the same by way of dividend to the stockholders.

At this time there remained in the hands of the assignee cash and merchandise \$73,284.16, and mill No. 2 and machinery unsold valued at \$200,299.67. The resolution provided that the title to mill No. 2 and appurtenances be allowed to remain in Mr. Moir's hands until further action of the stockholders, and that he should endeavor to sell the same, etc.

On the same day, and immediately after the adjournment of the stockholders' meeting, a meeting of the directors of said company assignor was held, when a resolution was adopted, as follows: "Resolved, In pursuance of the vote of the stockholders this day passed, that as rapidly as money shall be received from James Moir, assignee, the same shall be divided as a dividend pro rata among the stockholders." In pursuance of this action the assignee paid to all the stockholders twenty dollars on each share of stock held by them respectively, including the petitioner, who held three hundred shares.

The assignee afterwards sold mill No. 2, together with the machinery and real estate appurtenant, for \$64,500, and this sale was ratified and approved by the stockholders at a meeting duly called, and of which the petitioner had notice, held August 26, 1890. At said meeting forty-five hundred shares of stock were represented. At a meeting of the board of directors this sale was approved, and the proper officers of the corporation were directed to unite with the assignee in the deed to the purchaser for the mill No. 2. Having now converted the assigned estate into cash and paid all the debts of the company and the estate, the assignee presented to the stockholders at a special meeting held September 2, 1892, of which the petitioner was notified, an account and report showing the above facts and that a balance remained in his hands of \$12,680.42.

After an examination, audit and approval by a committee of the stockholders, between May 17, 1890, and September 2, 1892, resolutions were unanimously adopted accepting and approving the said report and account, and authorizing the directors to cause the filing of a petition for a reassignment of the estate remaining in the hands of the assignee. At this meeting forty-eight hundred shares of stock were represented. None of these meetings were attended by the petitioner. The resolutions of this last meeting are in part as follows:

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1st. That said report be and the same is hereby approved and accepted.

2d. That the said account be and the same is hereby approved and accepted without filing in court or audit.

Under this statement of facts should the assignee be compelled to file an account in court?

The seventh section of the act of June 14, 1836, P. L. 1835-1836, page 631, provides that "it shall be lawful for the Court of Common Pleas of the proper county, on the application of any person interested, etc., to issue a citation to any assignee or trustee for the benefit of creditors, etc., requiring such assignee or trustee to appear and exhibit under oath or affirmation the accounts of the trust in the said court," etc. The acts relating to assignments do not in terms require the filing of an account unless the assignee shall be requested so to do, or unless the estate being insolvent it becomes necessary to make distribution under the direction of the court; but there can be no question that an accounting in some way is necessary. In this respect the bond of an assignee differs from that of an executor or administrator, in which one of the conditions is to file an account. It would appear, therefore, that the court has a discretion in the matter, to be exercised according to the facts of each case.

In this case the duty of the assignee was:

1st. To collect and convert the assets.

2d. To pay the debts.

3d. If any balance remained, to reassign to the assignor.

4th. The duty of accounting to his assignors or persons interested.

He has collected and converted the assets, has paid all the debts, has paid part of the balance remaining in his hands to the stockholders, and is ready to pay to them what remains. Mr. Boyd, the petitioner, is the only stockholder who asks for an account to be filed in court. He does not allege any improper conduct on the part of the assignee nor give any reason why an account should be filed, nor how he is injured by the account exhibited to and approved by the stockholders and directors of the company assignor. We think the assignee has accounted to the proper parties. The corporation was his assignor. His duty was to it as a corporation. His reas-

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signment must be to the corporation and not to the stockholders. It would be intolerable if every owner of a share of stock could harass and embarrass the assignee in the performance of his duty without alleging something wrong or improper in his conduct of the trust. Two meetings of the stockholders were called, of which the petitioner had notice but at which he did not attend. At both these meetings the accounts of the assignee were approved after examination by a proper committee. The board of directors approved both reports and accounts, and the stockholders and the directors passed resolutions relieving the assignee from the necessity of filing an account in court and of an audit. We think that in the absence of any charge of mismanagement this satisfies the requirements of the law, and that an account would be useless.

If the petitioner had attended the called meetings, he could have had access to the books and papers relating to the trust, and placed himself in a position to be informed of their correctness. Instead of so doing he has placed himself in the position of claiming an arbitrary right to an account without assigning a reason why the court should intervene in his behalf. If necessary, his act of receiving his dividend might be declared an estoppel, but it is not necessary now to decide the case upon that point; nor is it necessary to hold now that he is bound by the action of the stockholders and directors. On the argument it was claimed that the assignment worked a dissolution, and that the directors had no duties to perform or authority to act in the matter of accounts. But in *Germantown Pass. R. W. Co. vs. Fitler*, 60 Penna. St. R., 124, the court held that "a corporation is not necessarily dissolved by its insolvency; nor, as has been held, by a writ of sequestration operating as a legal divestiture of all its available assets (*Mann vs. Pentz*, 3 Comstock, 422); much less, it would seem, by a voluntary assignment for the benefit of creditors. If it keeps up its organization it still exists in law, and its franchises and powers not capable of assignment must be exercised by it, but in subserviency to its legal and equitable obligation." See also *West Chester and Phila. R. R. Co. vs. Thomas*, 2 Phila., 344. *Craig's Appeal*, 92 Penna. St. R., 396, arose under the banking act, and does not apply.

It further appears by our records in this case that on September 5, 1892, in accordance with the resolution of the board of directors, the assignor corporation has presented to this court its petition, in

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which it is represented that all the claims upon the assigned fund or estate have been fully paid and discharged, as per report of assignee annexed, and asking for a reassignment to the assignor of all the said assigned estate now remaining in the hands and possession of the assignee, and for the release and discharge of the assignee. The report annexed states that all claims of creditors have been paid, that \$113,472.74 has been distributed amongst the stockholders on account of their several holdings, that the whole assigned estate has been converted into cash, and that there remains in the hands of the accountant a balance of \$12,680.42. This petition took the usual course. We have here again the assignors agreeing to the account of the assignee and accepting it as true. No exceptions have been filed to it, and it is now ready for our approval. In the absence of any exceptions we must assume the facts therein stated to be true, and therefore we have no reasons of record why a reassignment should not be decreed. If the petitioner, Mr. Boyd, has any cause of complaint, it is against the directors, his representatives; but whether he has or has not, we are of opinion that he has shown no just ground to invoke the equitable interference of the court. His contention that he is entitled to be paid his share of the balance in the hands of the assignee by the assignee, and that he is not compelled to look to the corporation for it, is, in our opinion, based upon an erroneous idea as to the effect of the assignment.

In our opinion it did not work a dissolution of the corporation. The result shows that the corporation was not insolvent. It has paid all its indebtedness, and had over a hundred and twenty-five thousand dollars left. True, its capital was impaired, but it does not follow that the stockholders might not make this good or reduce the capital. The payment of twenty dollars per share to the stockholders was tacitly acquiesced in by every stockholder who received his share. It may be that a majority of the stockholders may desire to retain their corporate rights and renew business. With this we have nothing to do; but we do not think that a stockholder can claim his proportion of the assets on account of his stock without the consent of the corporation or until a final dissolution. If instead of cash the balance was represented by land, what claim could the petitioner for himself alone make that the assignee should sell it?

Having paid the debts, the assignee's duty was to restore what was left to his assignor, especially when so requested. We think

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the same reasoning applies to the cash on hand. An analogous proceeding is that of an assignment of a bank, under the act of 16th April, 1850, P. L. 489, where the surplus after paying debts is to be paid to the directors for distribution amongst the stockholders. It may be that the stockholders are now willing to distribute this balance in the same proportion as the former distribution was made, and if so an account and audit for this purpose would be useless under the facts as presented by the petition and answer.

And now, January 9, 1893, the petition is refused.

JOSEPH T. JACKSON VS. J. DAWSON THOMSON.

Where a suit is discontinued a new proceeding for the same cause of action will be stayed until the costs in the prior suit are paid. Garnishee's fees are part of the costs to be paid on a discontinuance.

In foreign attachment a supplemental affidavit or second attachment in the same suit is not allowed; but where the merits of the case were not passed upon the action may be discontinued and a new attachment may issue.

RULE to show cause why proceedings should not be stayed and writ quashed. No. 109, June T., 1892.

J. P. Hale Jenkins, Esq., for rule.

Benj. E. Chain, Esq., contra.

Opinion of the court by SWARTZ, P. J., November 7, 1892.

The plaintiff proceeded in foreign attachment against the same defendant to March Term, 1892, No. 130. This attachment was dissolved because the plaintiff failed to file any affidavit showing his cause of action. The suit was then discontinued, and the costs, other than counsel fees of the garnishee, were paid.

The present action was then brought, and the property attached is the same as that taken under the prior suit.

The garnishee now asks that proceedings stay till his costs are paid. He also asks in behalf of the defendant that the writ be quashed, because a prior attachment was dissolved.

The garnishee's fees are a part of the costs to be paid upon a discontinuance: Act of 29th April, 1891, P. L. 35. It is our duty to stay proceedings until these costs are paid: *Flemming vs. Insurance Company*, 4 Penna. St. R., 475.

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A second attachment for the same cause of action may show an abuse of the process of the court, and may show oppression; but in the case before us we can not say that there is any abuse or oppression. The plaintiff's counsel failed to file any affidavit because his client was absent, and the statement showing the cause of action arrived a short time after the attachment was dissolved. In the prior suit the merits of the case were not considered. The affidavit was not declared insufficient, but the dissolution followed because no affidavit was filed at the time fixed for a hearing. We accept the statement of counsel as made in good faith, and to quash the writ is to deny the plaintiff a hearing upon the merits of his case.

The cases cited in support of the motion to quash hold that a supplemental affidavit or second attachment can not be allowed; but in these cases the second attachment or supplemental affidavit proceeded under the original suit, which was neither discontinued nor appealed from: *Graham vs. Canton and Waynesburg R. R. Co.*, 26 W. N. C., 103; *Eldridge vs. Robinson*, 4 S. & R., 548; *Jacobs vs. Montague*, 27 W. N. C., 35.

A different rule may be applicable where the original suit is discontinued and a new action is commenced. This distinction was drawn by the lower court in *Hopper vs. Hentz*, 133 Penna. St. R., 35. The court said: "We think the quashing of the first attachment was equivalent to a non-suit, which left the plaintiffs free to pursue any remedy provided by law for the recovery of their claim." To the same effect is *Bank vs. Tasker*, 1 County Court, 173. This distinction is also noted in the case cited by counsel for garnishee, *Graham vs. R. R. Co.*, *supra*.

Questions not raised by the application to dissolve the attachment or to quash the writ can not be considered by the court.

And now, November 7, 1892, the proceedings are stayed until the costs in the former action are paid, and the motion to quash is refused and the rule is discharged.

THE BUCKWALTER STOVE CO. VS. JOHN WOOD, JR.

Where a case is heard upon its merits, and the variance between the evidence and the statement is technical rather than substantial, an amendment if necessary may be allowed at any stage of the proceedings.

Without warranty the purchaser is bound although the goods delivered are of an inferior quality, but the article must correspond in kind to that ordered.

Where a manufacturer furnishes a machine of a particular kind or description, there is an implication that the article is reasonably fit for the purposes for which such machines are used.

It is not enough that there are verbal stipulations contradictory of a written agreement in order to change its legal effect; there must be an allegation of fraud, accident or mistake, or the party must have been induced to sign the instrument because of the verbal stipulation.

The doctrine that parol evidence is not admissible to add to or vary a written agreement is rigidly enforced in cases where it is sought to add parol warranties or guaranties.

MOTION and reasons for a new trial. No. 155, June T., 1892.

Charles Hunsicker, Esq., for motion.

Hallman & Place and Henry Freedley, Esqs., contra.

Opinion of the court by SWARTZ, P. J., February 6, 1892.

The defendant was the manufacturer of the "Wood Tubular Boiler." He was the inventor and held letters patent under which he manufactured the boilers. The plaintiffs were engaged in the stove business, and purchased a Wood boiler to supply the steam in the operation of their factory. They allege that the boiler was purchased on a guaranty, and suit was brought to recover damages for a breach of the guaranty.

The defendant answers that he sold to the plaintiffs a one hundred horse-power boiler for sixteen hundred dollars, but did not guarantee it. The jury found a verdict for plaintiffs for the sum of two hundred and twenty-five dollars. The defendant asks us to set aside the verdict because the plaintiffs were allowed to recover upon a written contract, although their statement shows that their suit was brought on a verbal contract.

The plaintiffs claim that we erred in instructing the jury that the plaintiffs failed to show any guaranty other than that which is implied where a manufacturer furnishes a machine to order to be of a certain capacity.

First, as to the defendant's motion for a new trial.

The statement of the plaintiffs alleges that they purchased a hundred horse-power boiler, and that the boiler received was not a

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hundred horse power. It is true that the defendant's testimony shows that the entire contract was in writing; but the plaintiffs contend that the specifications submitted to them were partly in blank and that the contract as to horse-power capacity was verbal. Both parties agree, however, that the boiler was to have a hundred horse-power capacity. Under the view we took of the case the capacity of the boiler furnished was one of the leading questions of fact submitted to the jury. It follows that if the point of law was even well made by the defendant, it had no application, for we could not instruct the jury as a fact that the horse-power capacity of the boiler was given in the written specifications under which the plaintiffs gave their order; the contract may have been verbal as to this matter. Again, the statement does not allege that the contract was verbal or that it was in writing; the language of the statement is applicable to a written or verbal contract. It is true the plaintiffs must file a copy of the written contract where suit is brought upon it; but the sufficiency of the statement was not questioned at the time issue was joined, and it may be that the statement was defective.

It does not follow that the plaintiffs relied on a verbal agreement because of this defect. If the plaintiffs' case as submitted showed a written contract, the defendant could have taken advantage of the variance before he entered upon the merits of his case instead of raising the question in the last point submitted for instruction to the jury. If necessary, the plaintiffs could have amended.

The defendant agreed to manufacture and put in place a boiler of a certain capacity. Did he comply with his contract? This was the principal question at issue. As we submitted the case to the jury there was no dispute as to the contract itself. In *Gaines vs. Brouckerhoff*, 136 Penna. St. R., 199, the bill in equity alleged an agreement in writing; the proof given showed it was verbal. The variance was not fatal. The court said: "A parol defeasance, sufficiently proven, is the equivalent of a written one. The vital question is not whether the agreement was reduced to writing but whether it was made." "Where a case is heard upon its merits, and the variance is technical rather than substantial, an amendment, if necessary, may be allowed at any stage of the proceedings."

Again, the defendant contends that the verdict can not be sustained although the jury found the boiler was not of the capacity ordered. This is based upon the theory that the boiler was pur-

chased without warranty or guaranty and was accepted by the plaintiffs. It is true the jury found that the retention of the boiler for twenty-two months under the circumstances shown, made it the property of the plaintiffs; but the jury must have found that it was not of the capacity ordered, because of its size, defective construction, or defective settings. If the defendant agreed to manufacture for the plaintiffs a hundred horse-power boiler for sixteen hundred dollars, and furnished a boiler of eighty-five horse power, there is no justice or equity in compelling plaintiffs to pay for that which they did not receive. There was evidence that the boiler was not of the capacity ordered. A boiler that was estimated by defendant's own expert at seventy-seven horse power developed as much pressure as could be obtained from the defendant's boiler in question. Plaintiffs' expert, Farron, estimated the boiler at eighty-five horse power. He did not apply the test specified in the contract, but he had large experience and his testimony was of some value, although not as satisfactory as a test by evaporation. He further declared that the boiler was not one hundred horse power unless all the heating surface of the tubes could be utilized, and there was abundant testimony that the construction was of such a character that this could not be done. The plaintiffs bargained for a boiler that would furnish a given power, and not for heating surface that could not be utilized. The size of the boiler was of no consequence if the required steam pressure could not be developed.

Where there is no warranty the purchaser is bound although the article delivered is of an inferior quality, but the article must correspond in kind to that ordered: *Whitehall Mfg. Co. vs. Wise*, 119 Penna. St. R., 484. While the defendant's boiler may or may not have been inferior in quality, the testimony tended to show that it was not the thing purchased, just as a car load of No. 4 siding lumber does not fill the bill where No. 3 siding was ordered.

Again, where a manufacturer furnishes a machine of a particular kind or description, there is an implication that the article is reasonably fit for the purposes for which such machines are used. When he agrees to build a hundred horse-power boiler he is bound to know that the purchaser is not liable if the boiler when properly operated fails to develop the stipulated motive power: *Smith's Leading Cases*, Vol. 1, page 314. The boiler was purchased to move machinery requiring one hundred horse power; if it failed to do this work it failed

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to do the kind of work for which it was made, and the purchaser is not liable: *Warder vs. Blair*, 4 Penny, 182. We conclude that the defendant has no good ground of complaint against the verdict or any of our rulings.

The plaintiffs contend that we erred in the instruction to the jury that the contract between the parties was in writing and in charging against the evidence of a guaranty. A careful consideration of the case and argument of counsel failed to convince us of any error. A review of the testimony upon the question of contract will, we think, sustain our position.

The defendant called at the works of the plaintiff company, and submitted specifications upon which he would furnish his boiler. Upon this point Mr. Stauffer, President of the plaintiff company, testified: "We had written specifications that Mr. Wood showed us at the time he solicited the order. I do not think they showed the price. The price was agreed on verbally and the horse power of the boiler was agreed on verbally." * * * "We have not among the assets of the Buckwalter Stove Company the original specification upon which I wrote this letter of January 29, 1890." "I have no doubt this [referring to the specification produced by defendant as a copy of the original paper] is similar, but I could not state from memory whether it is just similar to this." "The specifications alluded to in that letter [the letter of January 29, 1890] were those that he presented—those blanks that he presented at the time." * * * "He had blank specifications there he filled out."

In the light of such evidence there can be no doubt that the defendant did submit specifications for a contract. If the President of the company had no doubt that the copy in evidence was similar to the paper left with them, how could we in the face of the positive testimony of the defendant's witnesses allow the jury to find otherwise? True, the witness said the paper was in blank as to number of horse power and price; but this was immaterial, for these matters were not in dispute.

The plaintiffs gave their order upon these specifications, as shown by the letter of January 29, 1890: "We have this morning agreed to put in your water tube boiler as per specifications and price named, on condition that you deliver the boiler and place it in

position at your expense besides superintending the putting up the same as agreed on when you were here. Answer."

And the defendant accepted the order under these specifications: "January 30, 1890. I have the pleasure to acknowledge receipt of your valued favor of the 29th inst. ordering water tube boiler as per my specifications of the 27th inst., with the understanding I am to deliver and place in position the boiler and also superintend the erection of same. * * *"

Mr. Stauffer says that when he used the words "as per specifications" in his letter giving the order he meant the verbal specifications. But how can we suffer such an interpretation to govern when he had already testified, "The specifications alluded to in that letter were those that he presented—those blanks that he presented at the time"; or when he had already declared, "The contract was made under the blank specifications that he showed us on the day he was with us."

The plaintiffs visited works where the Wood boiler was in use. After examination they gave their order without any intimation at the time of the letter or in the correspondence that they acted in pursuance of an existing verbal guaranty.

The specifications, order and acceptance constitute the written contract between the parties, and the plaintiffs so understood the matter, otherwise their letter of September 30, 1890, is inconsistent. They say: "The flue taken out was very defective, as shown when taken out, and we expected to have at least some guarantee for durability. In all those points we were assured the boilers were all right when our Mr. Buckwalter was shown around before buying; and since this occurred so soon, and the boiler not measuring up to the recommendation in saving fuel, etc., we do not expect to be asked to pay the bill. Enclosed find bill returned." This certainly is not the language of a purchaser who bought under a guaranty as to durability or saving of fuel. He would not say, we *expected* to have some guarantee, we *were assured* the boilers were all right, the boiler does not measure up to *recommendation*.

The alleged declarations of the defendant prior to the contract are little more than commendations of his boiler. They show a willingness to guarantee the boiler, and do not show an actual guaranty. "He said he would guarantee," or "he said 'I will guarantee.'" This is the general character of the declarations. They were well calcu-

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lated to put the plaintiffs on their guard. If they meant to rely on them they should have been introduced into the written contract, or some intimation should have been given at the time of the contract, that the order was given on the faith of these prior declarations.

Counsel for plaintiffs contend that we do not give due weight to the other correspondence in the case. They say the defendant's letter of January 27, 1890, in which he confirms his conversation of that day, is of great importance. We do not see how this letter can alter the subsequent contract. The parties did not see fit to make these conversations a part of their contract. There is an entire absence of any guaranty in the specification, and the plaintiffs were satisfied with it as it stood and gave their order under it.

We think the authorities sustain our positions.

The written order and acceptance constitute a written contract, and we must look to the written specifications for the terms of the contract, because the parties refer to them in their letters. In this written contract there is no intimation that the plaintiffs are relying upon the prior conversations. There is no allegation of fraud, accident or mistake. Under such facts we are confined to the writings to ascertain the contract; they are not only the best but only agreement of the parties: *Martin vs. Berens*, 67 Penna. St. R., 459; *Thorne vs. Warfflein*, 100 Id., 527.

The conversations were not had at the time the order was given. It does not appear that the parties met on the 29th of January, 1890. Verbal declarations to affect a written instrument must be contemporaneous with it: *Frey vs. Heydt*, 116 Penna. St. R., 601. But even if made at the time of the execution of the writing, there must be some excuse for their omission before they can be given in evidence. The defendant was not guilty of any conduct or act that occasioned the omissions. It is not enough that there are parol stipulations contradictory of a written agreement in order to change its legal effect: *Thorne vs. Warfflein*, *supra*. It is true the plaintiffs say they were induced to give the order because of the offer to guarantee the boiler; but what evidence is there that this understanding on the part of the plaintiffs was communicated to the defendant? The unexpressed intent, motive or belief existing in one party's mind at the execution of a contract can not aid the jury in determining whether the other party gave cause for such motive: *Spencer vs. Colt*, 89 Penna. St. R., 314; *Cullmans vs. Lindsay*, 114 Id., 166. If

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the defendant had said, "It is not necessary to enter the guaranty into the agreement; I will observe it," then plaintiffs would bring themselves within the rule of *Laird vs. Campbell*, 100 Penna. St. R., 159. This is of great importance when we remember that there never was a contract of guaranty; there was but an offer to guarantee, which was never accepted.

The doctrine that parol evidence is not admissible to add to or vary a written contract is rigidly enforced in cases where it is sought to add parol warranties or guaranties: *Benjamin on Sales*, Vol. 2, Sec. 942, and note. Where the vendor offers to warrant at the commencement of a treaty of sale, and the contract is finally consummated by a writing in which the warranty does not appear, everything which it does not contain will be presumed to have been discarded by the parties, and the ordinary rule that parol evidence can not be given to modify a written contract will prevent the vendee from relying on the warranty: *Smith's Leading Cases*, Vol. 1, page 345, and cases there cited; *Seitz vs. Brewing Co.*, 141 U. S., 517.

The authorities cited by the plaintiffs do not, in our judgment, help their case.

It is true that a written order and reply do not exclude other evidence where they do not show a completed contract: *Miller vs. Fichthorn*, 31 Penna. St. R., 256; *Holt vs. Pie*, 120 Id., 425. In the latter case the order referred to a verbal agreement, and thereby the parol agreement became part of the contract; but in the case before us the order referred to certain written specifications for the terms of the contract, and these we admitted as part of the written agreement. There was no reference to any oral declarations, and the writings before us make a complete contract.

Where it is shown that the contract would not have been signed but for the oral stipulations at the time, the oral declarations become part of the agreement: *Laird vs. Campbell*, 100 Penna. St. 164; *Walker vs. France*, 112 Id., 203. But there must be some evidence from the transaction itself to show such inducement to execute the writing. In *Laird vs. Campbell* the compromise was not signed until it was agreed that it should not be binding unless all creditors signed. In *Walker vs. France* the contract was not signed until Walker agreed that the guaranty should be as binding as if made part of the articles of agreement.

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The jury found that the delay of twenty-two months before any offer to return the boiler was conclusive proof, under the circumstance, of an intention to retain it. We do not see how they could have found otherwise. The plaintiffs say the boiler was unsatisfactory from the first. After certain alterations it was no better; still they continued to use it for the greater part of a year after these repairs or alterations were made, and this without any assurance from the defendant of further attempts to remedy the deficiencies.

The damages given by the jury may not compensate for all the loss sustained by the plaintiffs, but they have themselves to blame. If the boiler received was not the boiler ordered, why was it not returned within a reasonable time after this knowledge was gained, or within a reasonable time after the defendant failed to make it satisfactory under his contract? Having found the fact that the plaintiffs retained the boiler, the jury was confined properly to the measure of damages laid down by the court.

And now, February 6, 1893, the reasons for a new trial are dismissed and a new trial is refused.

Supreme Court of Pennsylvania.

IN RE WELLINGTON H. ROSENBERY, BURGESS.

A Burgess of a borough incorporated since the act of June 2, 1871, is not a member of the Town Council, nor is he entitled to preside at the meetings thereof, unless the decree of the court authorizes the Burgess so to act.

The act of April 1, 1834, which provides that "the Burgess shall be president of Town Council, and shall have and exercise all the rights and privileges of a member thereof," is supplied by the act of June 2, 1871.

APPEAL from the decree of the Court of Common Pleas of Montgomery county.

Hallman & Place and *N. H. Larzelere, Esqs.*, for appellant.

N. D. Tyson and *Jacob V. Gotwalts, Esqs.*, for appellee.

Opinion of the court by PAXSON, C. J., February 13, 1893.

Rosenberry's Appeal.

The appellant is the Burgess of the borough of Lansdale, and has taken this appeal from the decree of the court below enjoining him from presiding at the meetings of the Town Council of the borough of Lansdale, and from interfering in the deliberations of said Town Council by voting or attempting to vote at any of the meetings thereof, and from in any way attempting to exercise any of the duties or functions of president or of a member of the Town Council.

No question of jurisdiction was raised, and we will proceed to dispose of the case on its merits. It was heard in the court below on bill, answer and facts admitted, and filed of record.

The facts so admitted and filed of record are as follows: "In addition to the facts alleged in plaintiff's bill, and admitted by defendant in his answer, the following facts are admitted and agreed upon, and it is agreed that they shall be placed upon the record as though found by a master and reported to the court:

"1st. That the borough of Lansdale is divided into two wards, known as the East and West wards respectively.

"2d. That each of said wards is represented by three Councilmen.

"3d. That the charter of said borough does not designate the corporate officers, or does not designate how the corporate powers are to vest.

"4th. The said charter was granted since the passage of the act of June 2, 1871, to wit: on August 24, 1872; and the court did not then nor has it since authorized the Burgess to serve as a member of the Town Council with full powers as such, or to preside at the meetings thereof.

"5th. That no Burgess of the borough of Lansdale has ever heretofore presided over the meetings of the Town Council, or exercised any of the functions of a member thereof."

The borough of Lansdale was incorporated by the decree of the Court of Common Pleas of Montgomery county on the 14th day of August, A. D. 1872.

The appellant was duly elected Burgess of said borough on February 16, 1892, and held said office at the time of the filing of this bill in the court below. At a meeting of the Borough Council, held March 8, 1892, appellant appeared and gave notice to Council that at the next regular meeting thereof he would, by virtue of the powers conferred on him by the acts of Assembly, preside over its

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deliberations. At the next regular meeting, on April 4th, he did appear and preside. This bill was then filed by the members of the Town Council to restrain him from further interfering with their deliberations.

The second section of the act of June 2, 1871, P. L. 283, provides as follows: "The number of members of any Town Council of a borough where the number is now fixed at five shall be hereafter six, and in boroughs hereafter incorporated under general laws the number of such Councilmen shall be six; but the several courts of the commonwealth having jurisdiction to incorporate boroughs may, in granting an incorporation, or upon application made to them for the purpose, fix or change the charter of any borough so as to authorize the Burgess or chief executive officer thereof to serve as a member of Town Council, with full power as such, and to preside at the meetings thereof."

This act is a supplement to the act of April 3, 1851, P. L. 320, commonly called the Borough act, and its provision must be read into that act. The effect of it is to fix the number of Town Council at six where the number thereof had only been five, and that in all boroughs thereafter incorporated under general laws the number of such Councilmen shall be six. Power is also given to the courts having jurisdiction to incorporate boroughs to change the charter of any borough so as to authorize the Burgess to serve as a member of Town Council, with full power as such, and to preside at the meetings thereof. This may be done in the original decree of incorporation, or the charter of an existing borough may be changed for this purpose.

The second section of the act of June 1, 1883, P. L. 54, provides as follows: "It shall be lawful for the qualified voters of the boroughs of the commonwealth of Pennsylvania not now enjoying this right of special statute, at the first election for borough officers next ensuing the passage of this act to elect one-third the whole number of Councilmen to serve for one year, one-third to serve for two years, and one-third for three years, and annually thereafter one-third of the whole number to serve for three years; provided, that in boroughs in which the Chief Burgess is one of six members of Town Council, the Chief Burgess shall be elected annually, and at the first election held for borough officers two of the Councilmen shall be elected for one

year, three for two years, and at succeeding elections two or three alternately for a term of two years."

The borough of Duquesne was incorporated by a decree of the Court of Quarter Sessions in 1891. The decree of incorporation provided that the Burgess of said borough shall serve as a member of the Borough Council, with full power as such member, and shall preside at the meetings thereof. At the first election for Town Councilmen following the decree of incorporation two were elected for the term of one year, two for the term of two years, and two for the term of three years. It was held by this court that the Chief Burgess, being a member of the Council under the charter of the borough, the case came within the act of 1883 before cited, and that there was no authority to elect two members for three years; that as the whole number of Councilmen, including the Burgess, was limited to six, two of them should be elected for one year and three for two years.

The appellant contends that he is a member of Town Council by virtue of the act of April 1, 1834, P. L. 165, the eighth section of which act provides, *inter alia*, that "the Burgess shall be President of Town Council, and shall have and exercise all the rights and privileges of a member thereof."

The Borough act of 1851, before referred to, is silent upon this subject. The sixth section of that act provides that "it shall be the duty of the Chief Burgess to sign the several by-laws, regulations and ordinances adopted after they shall have been duly and correctly transcribed by the secretary." The eighth section provides that "the secretary shall transcribe the by-laws, rules, regulations and ordinances adopted in a book kept for that purpose, and, when signed by the presiding officer, shall attest the same," etc.

We fail to see any recognition in either of these sections, or elsewhere in the act, of the right of the Burgess as a member and presiding officer of Council. The fact that it is his duty to sign ordinances adopted by Council does not create him a member of that body, any more than the performance of that duty by the Mayor of the city of Philadelphia makes him a member of City Councils; and the fact that the eighth section recognizes a presiding officer of Town Council does not recognize the Burgess as such presiding officer.

The question whether the act of 1834, before referred to, has been repealed by the act of 1871, has never been decided by this

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court. There are numerous decisions by the respective Courts of Common Pleas throughout the state upon the question, and they are not by any means harmonious. They are perhaps pretty evenly divided, and nothing would be gained by their discussion. It is quite time it was disposed of and an end put to the confusion that has resulted from this uncertainty. If the act of 1834 is still in force, then the appellant is a member of Town Council, and said Council consists of seven members, which is one more than the act of 1871 permits. The act, as before stated, limits the number to six, and where it makes the Burgess a member thereof only five can be elected, as we held in the case before referred to.

We are of the opinion that this provision of the act of 1834 is supplied by the act of 1871, and that the appellant is not a member of the Council or entitled to preside at its meetings. The Burgess is only a member when it is so provided in the charter or by the decree of the court.

The decree is affirmed and the appeal dismissed at the cost of the appellant.

Court of Common Pleas of Montgomery County.

IN RE CRAIG HEBERTON.

Township assessors are required to value properties for taxation at what in their judgment it would bring at a bona fide sale after full public notice.

The act of April 19, 1889, P. L. 38, providing for appeals from assessments, requires the court to make such orders and decrees as may seem just and equitable, having due regard to the valuation and assessment made of other real estate in the county. Under this act the assessed valuation of particular properties does not furnish a proper basis of assessment for all other properties. In the absence of evidence showing a custom to assess below market value, we must assume that the assessors did their duty.

APPEAL from assessment of real estate for purposes of taxation.

Wm. Drayton, Esq., for appellant.

James B. Holland, Esq., for County Commissioners.

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Opinion of the court by SWARTZ, P. J., February 20, 1893.

At the triennial assessment for 1891 the assessors valued the appellant's real estate for taxation at forty-one thousand six hundred dollars. Upon appeal the Commissioners reduced the assessment to thirty-seven thousand dollars. From this action of the Commissioners the complainant appealed to the Court of Common Pleas under the act of April 19, 1889, P. L. 38.

The appellant's real estate consists of a farm of fifty-four acres and thirty perches of land. He became the owner in 1887, and has since erected a mansion-house and stable at a cost of about thirty thousand dollars.

It is admitted that the real estate in question is valued at about "the rate or price which the same would sell for if sold at a bona fide sale"; but it is claimed that the assessment is not just and equitable as compared with the valuations put upon other real estate in the immediate vicinity.

According to the evidence submitted to us, some of the properties in the neighborhood of the appellant's farm are assessed at fifty to seventy-five per centum of their market values. The witnesses called by the appellant differ so much in their estimates of value that it is impossible to determine the market value of properties in the neighborhood. Mr. Carn says the complainant's property is worth thirty-five thousand dollars, while Mr. Whitcomb says the property is worth thirty-two thousand four hundred dollars exclusive of the mansion-house and stable. As these improvements cost thirty thousand dollars, they ought to add very much to the value of the premises. Mr. Emlen says the whole property is worth thirty-eight thousand six hundred dollars. Two of the witnesses fix the value of Mr. Fell's property at sixty-six thousand and fifty-four thousand respectively; while the third witness estimates its value at one hundred and one thousand dollars. Mr. Sheaff's property is assessed at twenty-five thousand. Mr. Whitcomb says it is worth thirty-five thousand, and Mr. Carn declares its market value to be eighteen thousand, or seven thousand less than the assessed value. Again, Mr. Carn testifies that the Shaffer tract is worth but sixty-six hundred dollars, while the assessed value returned is nine thousand dollars. The witnesses differ very much in their estimates, but they agree that in most of the cases to which their attention was called the assessment is below

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the market value. The evidence was taken more than nine months after the assessors completed their work, and the rapid advance in real estate in this part of the county may, in part at least, explain the low assessments. This fact may also explain the evidence of the assessor who was called as a witness, and who now values most of these properties above the assessments returned. He swears that the assessors made a fair and equitable valuation of the various tracts at the time of the assessment. We should not condemn their work without taking into consideration the circumstances under which their work was done. The demand for suburban homes in this section of the county and the projection of new railroad lines make it almost impossible to determine the market value of the farm properties. The value of the land for farming purposes is far below its true market value. A few sales in the neighborhood at high figures will immediately swell the selling price of the surrounding properties. The task of the assessors, it will be seen, is not an easy one.

Has the appellant shown any good cause for his complaint?

The assessors under their oaths were required to value the property of the appellant at what in their judgment it would bring at a bona fide sale after full public notice. The testimony shows that this part of their duty was well performed.

Under the act of April 19, 1889, the court upon appeals from the assessments is to make "such orders and decrees as may seem just and equitable, having due regard to the valuation and assessment made of other real estate in such county or city." This does not mean that the assessed valuation of any particular properties is to form the basis of assessment for all other properties. The mistake of an assessor, or an error in judgment on his part as to particular properties, forms no guide for our action. We must not perpetuate his mistakes, but correct them by making assessments conform to the law and the rules generally observed throughout the county. There is no evidence that the assessors in the county of Montgomery are in the habit of valuing properties below market price, or that the Commissioners tolerate any such custom or conduct. In the absence of testimony upon this point we must assume that the assessors did their sworn duty. Even if we were to find that the assessors in the township of Upper Dublin failed in their duty as to certain properties, it does not follow that such error attaches to all their work, much less does it show that the assessors

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throughout the county were derelict in the discharge of their duties. The act says we are to have due regard to the other assessments *in the county*; it does not declare that we are to be governed by the assessments in a particular township or part of such township. If it were customary to assess property throughout the county generally at seventy-five per centum of its real value, then the appellant should have the advantage of such custom.

The complainant does not bring himself within the ruling of Richter's Appeal, 8 C. C. R., 119, for in that case it was shown that the county assessors in Lycoming valued properties for taxation at fifty per centum of the real value. We are not aware of any such custom in this county, and the evidence offered by the appellant shows that some of the properties in the vicinity of his farm are assessed beyond their market value.

It may well be that there is some inequality in the assessment of properties in the neighborhood of appellant's farm. Perhaps such inequalities can be found in most of the other townships. They show the importance of selecting good men, specially qualified, to serve as assessors.

We conclude that the complainant's property is assessed for purposes of taxation at no more than it would bring at a bona fide sale; that the assessment was made, so far as we have any evidence, with a due regard to the valuation and assessment of other real estate in the county.

And now, February 20, 1893, after hearing the appeal, it is hereby ordered and decreed that the assessment of appellant's property for taxation, as revised by the County Commissioners on May 11, 1892, be affirmed and approved, the costs of the appeal to be paid by the appellant.

ABRAHAM WALT VS. JONAS A. KULP.

The testimony of a single witness is not sufficient to overthrow the written agreement of the parties.

Where a partner is indebted to his co-partner upon a settlement of accounts, gives his due bill for the debt, and the business is continued, a subsequent sale of one partner's interest in the firm to the other does not discharge the due bill.

MOTION for judgment *non obstante veredicto*. No. 201, October T., 1891.

Childs & Evans, Esqs., for plaintiff.

Wanger & Knipe, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., March 6, 1893.

There was no evidence sufficient to vary, alter or modify the written agreement. The conversations, if they referred to the due bill, were had subsequent to the execution of the agreement, and the testimony of a single witness is not sufficient to overthrow the written agreement of the parties.

Did the defendant's compliance with the contract of sale satisfy the due bill? Several months prior to the time of dissolution the partners had a settlement of accounts. It was found that the defendant owed the plaintiff at that time two hundred and eight and thirty-six-hundredths dollars. The due bill in suit was then given. By this action the claim became an individual obligation, without any reference to the existing partnership relation. It was now a debt due the plaintiff independent of the partnership, just as much so as a loan of that much money to the defendant. The agreement provides that "the above settlement is to include everything pertaining to said tract of timber land." But the due bill did not pertain to the timber land. A careful reading of the whole agreement shows that the defendant bought everything belonging to the partnership, including all the assets of the firm. There is nothing to indicate that by such purchase he was discharging his individual indebtedness. If the due bill was a matter still pertaining to the partnership, then the defendant should pay it, for he assumed the debts of the partnership.

That the parties did not mean to discharge the due bill by the agreement is shown by the fact that each was willing to take from the other thirteen hundred dollars for his share of the partnership. Why should each agree to sell at the same figures if the plaintiff's interest was worth two hundred and eight dollars more than that of

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the defendant? The plaintiff's due bill was paid, if we take the defendant's version of the agreement; and yet the plaintiff had no advantage over the defendant in the settlement. According to the defendant's interpretation of the contract, the plaintiff cancelled the due bill without any consideration.

It was also claimed at the trial that the note or due bill represented the amount paid into the business by the plaintiff in excess of that paid in by the defendant; that there was, therefore, due plaintiff but one-half of the two hundred and eight dollars. The affidavit, however, admits that at the time the due bill was given the full amount was due from the defendant. At the trial the partners were not able to explain fully how the amount of the due bill was made up. In the absence of clear evidence we must assume that the note is correct; it was given when the settlement was made, and at a time when the parties must have known what they were doing.

And now, March 6, 1893, the motion for judgment *non obstante veredicto* is overruled; and it is now ordered that judgment be entered in favor of the plaintiff and against the defendant on the verdict of the jury.

MARTHA HYDE VS. ISAAC CHISM, ADMINISTRATOR, ETC., OF DULCINA GOSHO, DEC'D.

An administrator is not required to file an affidavit of defence where the cause of action arose in the life-time of the decedent.

RULE for judgment for want of a sufficient affidavit of defence.
No. 177, October T., 1892.

Henry A. Stevens, Esq., for plaintiff.

Isaac Chism, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., February 20, 1893.

Under our rules of court an administrator is not required to file an affidavit of defence where the cause of action arose in the life-time of the decedent. Even in the absence of such rules the affidavit could not be required: Seymour vs. Hubert, 83 Penna. St. R., 346. The civil procedure act of May 25, 1887, P. L. 271, does not change the law in this respect: Marlin vs. Waters, 24 W. N. C., 129; Kennedy vs. Kennedy, 5 Montg. L. R., 187; Boyd vs. Moir, 7 Id., 50.

And now, February 20, 1893, rule for judgment is discharged.

EUGENE KUEBLER VS. E. F. QUIGLEY.

The law favors the right of appeal from the judgment of a justice of the peace because it involves the right of trial by jury.

Where the appellee suffers no delay by the perfecting of an appeal he is not injured, and the amendment should be allowed.

In a suit for wages before a justice the defendant may perfect his appeal before the next term of the Court of Common Pleas by entering a new recognizance and filing an affidavit that the appeal is not for delay.

MOTION to strike off appeal from justice of the peace. No. 177, June T., 1892.

D. H. Ross and J. P. Hale Jenkins, Esqs., for plaintiff.

Henry M. Tracy, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., February 20, 1893.

The appeal before the justice was taken in good faith and within the twenty days prescribed by law, and the transcript was filed with the Prothonotary on the 3d day of June, 1892, before the first day of the next term of the Court of Common Pleas. The action before the justice was brought to recover wages. The appeal was defective because the recognizance was given for costs only, and not for debt and costs. There was no affidavit that the appeal was not taken for delay. On June 3, 1892, before the transcript was filed, the justice allowed an amendment covering the foregoing defects. A proper bond and affidavit were entered before him, and an affidavit showing that the appeal was not taken for delay was filed with the Prothonotary. The transcript as filed contained the amended proceedings before the justice.

The plaintiff suffered no delay by the perfecting of the appeal; he was not injured. The law favors the right of appeal because it involves the right of trial by jury. The case is ruled in all respects by *Womelsdorf vs. Heifner*, 104 Penna. St. R., 1. We shall treat the amendments already made as if made by leave of court, though we do not consider such action necessary.

And now, February 20, 1893, the motion to strike off appeal is refused.

GEORGE D. HEIST, EXECUTOR, ETC., VS. M. LUTHER KOHLER.

A submission to arbitration is valid, although not in writing, and a verbal award is good unless the submission provides otherwise.

In an affidavit of defence where the defendant swears to facts within his own knowledge, it is not necessary to allege that he expects to be able to prove them at the trial.

MOTION for judgment for want of a sufficient affidavit of defence.
No. 18, March T., 1893.

B. E. Chain, Esq., for plaintiff.

Childs & Evans, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., March 6, 1893.

If the defendant can establish the facts alleged under the rules of evidence applicable to his case, his defence is good.

A submission to arbitration is valid although not in writing. A verbal award is good, unless the submission provides otherwise: *McManus vs. McCullough*, 6 Watts, 357.

The defendant fails to allege that he expects to be able to prove the matters set up in his affidavit; but this is not necessary in a positive affidavit like this. He is a competent witness, and his defence relates to matters necessarily within his own knowledge: *Eyre vs. Yohe*, 67 Penna. St. R., 477.

And now, March 6, 1893, the motion for judgment is refused and the rule is discharged.

Orphans' Court of Montgomery County.

ESTATE OF JOHN ESPENSHIP, DEC'D.

To work a conversion of real estate there must be a positive direction to sell or an absolute necessity to sell in order to execute the will, or such a blending of real and personal estate by the testator in his will as clearly to show that he intended to create a fund out of both real and personal estate and to bequeath the said fund as money.

APPLICATION to restrain sale of real estate.

Wm. F. Dannehower, Esq., for application.

N. H. Larzelere and E. F. Slough, Esqs., contra.

Opinion of the court by SWARTZ, P. J., March 6, 1893.

The testator left to survive him five children. He provided for the payment of his debts and funeral expenses, and gave certain pecuniary legacies to three of his children. He then directed as follows: "I give and bequeath unto my daughter Sallie Espenship and her heirs all the goods, merchandise, furniture and fixtures in and belonging to the store situate at the northeast corner of Walnut and Airy streets, in said borough of Norristown, and the rest and residue of all my estate unto her my said daughter Sallie during her natural life. For this purpose I appoint my friend Augustus Thomas her trustee to hold said estate for her use and benefit, paying her the income thereof half yearly or as she may need it; and immediately after her decease said estate so held in trust to go to and be equally divided between my children, James, Maria, John, Abraham, and Sallie's children if any, share and share alike, and absolutely." He then named his three executors, and concluded as follows, "giving unto them full power and authority to sell any of my real estate and give good and sufficient deeds for the same, said sales to be public or private as my executors deem it to the best advantage of my estate."

Before the testator died he disposed of the goods, merchandise, and furniture, which under his will were given to his daughter Sallie.

The personal estate is valued at sixty-four hundred dollars, and is more than sufficient to pay the debts; but the balance will not pay the pecuniary legacies, aggregating thirty-two hundred dollars.

Espenship's Estate.

The real estate consists of five houses and the lots upon which the buildings are erected.

The executors propose to sell all the real estate and pay over the balance of proceeds, after deducting debts and legacies, to the daughter's trustee.

Counsel for the daughter contends that there is no authority under the will to make such sales. He also claims that if such power of sale is given that it can not be exercised at this time, because the daughter filed her election to take the houses for life. She is willing, however, that so much of the real estate shall be sold as may be necessary to satisfy debts and the pecuniary legacies. Four of the five houses are small, and it may well be that they yield a better income than can be obtained from an investment of the proceeds of their sale.

The will shows that the daughter was the special object of the testator's bounty. We must give effect to this intention by giving her as large an interest in the estate as a fair interpretation of the will justifies.

We are not fully satisfied that there is a conversion of the real estate. The same paragraph in the will that gives her certain personality, gives her the rest and residue of the estate for her use and benefit. The word "income" is applicable to rents as well as to interest derived from an investment. After her death the "estate so held" goes directly to the children. The property is not given to the executors to be equally divided among the children.

In order to work a conversion there must be either a positive direction to sell or an absolute necessity to sell in order to execute the will, or such a blending of real and personal estate by the testator in his will as clearly to show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money: Hunt's Appeal, 105 Penna. St. R., 128.

In the case before us there is but a naked power of sale. We can not say that there is an absolute necessity to sell in order to execute the will. No doubt the testator believed his personal estate sufficient to pay debts and legacies. If he made a mistake, or his personal estate was diminished in his life-time so as to create a present necessity to sell, this is not to the purpose. A necessity to sell real estate which was not foreseen by the testator will not work a conversion: Hunt's Appeal, *supra*. Whether it would be necessary

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to sell the real estate to divide it among the children after the daughter's death, does not clearly appear. They may divide it among themselves without a sale, or they may sell it as owners. There is no direction that the executors shall make such division, nor is the real estate given to the executors in trust for the legatees in remainder. In the absence of testamentary authority an executor has no greater power over the real estate of his testator than the ordinary administrator has over that of his intestate.

Again, there is no such blending of real and personal estate by the testator as evinces a clear intent to convert. If we are correct, there was a disposition of the personal estate to pay debts and legacies presently payable—that is, an intent to exhaust the personalty and reserve the real estate for the life of the daughter Sallie. Before the blending of real and personal estate works an equitable conversion it must clearly appear that the testator intended thereby to create a fund raised out of both real and personal estate, and to bequeath said fund as money: *Perot's Appeal*, 102 Penna. St. R., 256.

While the case is not free from doubt, we think the clear intent to convert is absent.

If, then, the power of sale is discretionary only, it should not be exercised except to serve some good purpose. If the sale is prejudicial to the daughter's interest, the power should not be exercised unless the sale is a necessity to protect the estate of the testator.

If the houses are kept in proper repair by the daughter, we do not see how the interests of the estate or the legatees in remainder can suffer. That real estate is selling at very low figures at this time is known to all. To force the properties upon the market at this time may greatly injure the petitioner without any corresponding benefit to any one interested in the estate.

The legatees in remainder do not ask for the sale except so far as the executors claim to speak for them. A full inquiry, after testimony is taken, may show the propriety of a sale. At this time it looks to us like a diminution of the estate through costs and commissions to the injury of petitioner without any benefit to the estate.

Again, even if the will does work a conversion of the real estate, the election of the daughter to retain the houses ought to prevail, unless such retention will jeopardize the best interests of the estate.

For the present we will restrain any efforts on the part of the executors to sell the real estate, except so far as such sale may be necessary to pay debts and the pecuniary legacies.

Court of Common Pleas of Montgomery County.

MURTA & CO. VS. STEPHENSON.

Mechanics' lien—Change of contract between owner and contractor—Omission to name contractor in lien.

No recovery can be had on a mechanics' lien which does not name the contractor where there is one.

Where goods are sold and charged to a contractor he should be named in the lien, even although the contract with the owner has been subsequently changed.

In such case, as the only contracted relation between the sub-contractor and the owner is through the contractor, the latter must be named in the lien, notwithstanding he may have been subsequently released by the owner or his contract annulled.

MOTION for a new trial and for judgment *non obstante veredicto*.

No. 138, June T., 1891.

Larzelere & Gibson, Esqs., for motion.

Charles Hunsicker, Esq., contra.

Opinion of the court by WEAND, J., March 6, 1893.

We think the undisputed evidence in this case shows that the plaintiffs contracted with A. C. Lukens, the contractor, for the erection of defendant's building. The goods were supplied to Lukens and charged to him, with the exception of some extras which defendant ordered and paid for. Defendant had no contract with plaintiffs except through Lukens. So far as plaintiffs were concerned, any change of the terms of the original contract did not affect them. To authorize them to lien the building they must show either a contract with the owner or the contractor, and if with the latter he must be named in the lien. This was not done, and hence the lien can not be sustained.

We can not see how the testimony relating to the promises made by defendant to Lukens in order to help him out can inure to plaintiffs' benefit or change their position. There was nothing in the evidence to warrant a recovery, and we should have directed a verdict for defendant. We, however, ordered judgment for plaintiffs, reserving the question of law as to whether there was any testimony upon which they could recover in order to save the expense and trouble of another trial if upon deliberation we should conclude that plain-

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tiffs were entitled to a verdict. We can now reach the proper result by entering judgment for defendant.

And now, March 6, 1893, the motion for a new trial is overruled and judgment is entered in favor of defendant *non obstante veredicto* upon the reserved point.

Supreme Court of Pennsylvania.

WILLIAM NICE, JR., VS. ALPHEUS M. WALKER.

Mechanics' liens—Contract—Covenant not to file liens.

In order to prevent a contractor or sub-contractor from filing a lien against a building there must be an express covenant against liens, or a covenant resulting as a necessary implication of the language employed; and the implied covenant should so clearly appear that the mechanic or material man can understand it without consulting a lawyer as to its legal effect. If a contract is so worded as to be fairly subject to another construction, it is a sufficient reason why it should not be held to bar the right of the sub-contractor to file a lien.

A building contract provided as follows: "The owner will not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said works or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the said works. The said parties of the second part agree to take, use, provide and make all proper, necessary and sufficient precautions, safeguards and protections against the occurrence or happening of any accidents, injuries, damages, or hurt to any person or property during the progress of the entire work, and for all such accidents, injuries, damages or hurt the said parties of the second part alone to be responsible, and not the said party of the first part or the architect; it being agreed that the work to be done shall be entirely under the control of the parties of the second part, except so far as provision is herein made for the instruction thereof by the architect." *Held*, that the contract did not contain either an express covenant against liens or any such implied covenant as to deprive a sub contractor of his right to lien the building.

If it is desired to prevent liens from being filed against a building, all that it is necessary to say in the contract is: "No lien shall be filed against the building by either the contractor or sub-contractor."

Authorities relating to covenants against liens considered, and *Dersheimer vs. Maloney*, 143 Penna. St. R., 532; *Tebay vs. Kirkpatrick*, 146 Id., 120; and *Bolton vs. Hey*, 148 Id., 156, overruled.

APPEAL from the judgment of the Court of Common Pleas of Montgomery county.

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Edward Saunders Dixon and *B. E. Chain, Esqs.*, for appellant.

De Forrest Ballou and *H. M. Brownback, Esqs.*, for appellee.

Opinion of the court by PAXSON, C. J., February 13, 1893.

This action was a scire facias sur mechanics' lien in the court below. The learned Judge held that it was ruled by *Dersheimer vs. Maloney*, 143 Penna. St. R., 532, as appears by the following extract from his charge to the jury: "It has been ruled by the Supreme Court in the case of *Dersheimer vs. Maloney*, 143 Penna. St. R., 532, which was a precisely similar proceeding, in which these precise words occurred, that this was a covenant against filing any lien or which would bar any claim either against the owner or his property, and I am bound to rule this case in the light of that decision."

It is manifest there is some confusion in the professional mind as to the line of cases commencing with *Schroeder vs. Galland*, 134 Penna. St. R., 277, in regard to the right of a sub-contractor to file a mechanics' lien; and if any portion of this confusion is justly chargeable to this court, we cheerfully accept our share of the blame. It may be that some of the cases will have to be slightly modified. In any event it seems necessary to review this line of cases to the extent at least of seeing just where we stand, and laying down a rule which will leave nothing in doubt as to the future.

In *Long vs. Caffrey*, 93 Penna. St. R., 526, the contractor for the erection of the building stipulated in writing with the owner that he would not file a mechanics' lien against said building, and we held that he was bound by his contract. This case was followed by *Scheid vs. Rapp*, 121 Penna. St. R., 593, in which the contractor covenanted "for himself, his heirs, executors and administrators, that he will not suffer or permit to be filed * * * any mechanics' lien or liens against the said building for the period of six months after its completion." The lien in this case, as in *Long vs. Caffrey*, was filed by the contractor himself; and we held, as in that case, that he was debarred by his own covenant from filing the lien.

In *Schroeder vs. Galland*, *supra*, we went one step further, and held that where the contractor had covenanted with the owner not to file a lien, nor to permit liens to be filed by others, the sub-contractors were bound by the covenant of the contractor with the owner; and as he could not file a lien, they could not. This was an inevitable and logical conclusion from the doctrine laid down in the

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prior cases. As was held in *Schroeder vs. Galland*, the only connection between the owner and the sub-contractor being through and by means of the contract between the owner and the principal contractor, the sub-contractor is chargeable with notice of all its terms and stipulations, and is bound thereby. He can not have the benefits of the builder's contract without accepting its conditions. The only ground upon which the contractor can bind the building for either materials or labor is by virtue of the authority delegated to him by the owner; and where no such authority is delegated, but, on the contrary, is expressly withheld, and he covenants that no liens shall be filed against the building, he can not file a lien himself nor can his sub-contractors do so.

In a *per curiam* opinion, filed at the commencement of this term, and which has not yet been reported, it was said in substance that the principle intended to be decided in *Schroeder vs. Galland* was that the sub-contractor can not file a lien where the contractor has expressly covenanted not to do so, or where such covenant appears by necessary implication from the contract itself. It is believed that the words "necessary implication" have not been understood as we intended them to be, and that most of the confusion arising in this class of cases grows out of this misunderstanding. It is possible we have not been sufficiently explicit upon this point. Hence, we have had case after case in which the contention has been whether the peculiar language of the contract between the owner and the contractor amounts to a covenant not to lien a building. If I am right in this, it is quite time that the law upon this subject should be defined so clearly that it can not readily be misunderstood. It should be so plain that every mechanic and material man, though of limited education, can understand it at a glance, and not be compelled to submit its interpretation to a lawyer, with the risk of a decision against him in the court of last resort.

To illustrate my meaning upon this subject I will now consider briefly the particular provisions of the contract in *Schroeder vs. Galland*, and the cases which have followed it, so far as they have been reported.

In *Schroeder vs. Galland* the contract between the owner and the principal contractor stipulated that the building should be built, finished and delivered over to the owner "free of all liens and incumbrances or any claims whatever that might arise under any

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action of the party of the second part or his legal representatives under this contract." It was further provided, as is usual in such contracts, that all wages of artisans and laborers, and all persons furnishing materials to the contractor on account of the contract, shall be paid by the contractor. These are the essential features of the contract, and we held in that case that the stipulation against liens was not only obligatory upon the principal contractor but also upon the sub-contractors, and that they could not recover.

In *Benedict vs. Hood*, 134 Penna. St. R., 289, the agreement between the contractor and owner contained an express covenant against liens in the following words: "And it is further agreed that the party of the first part will not at any time suffer or permit any lien, attachment, or other incumbrance, under any law of this state, or otherwise, by any person or persons whatsoever, to be put or remain on the building or premises into or upon which any work is done or materials are furnished under this contract for such work and materials, or by reason of any other claim or demand against the party of the first part; and that any such lien, attachment, or other incumbrance, until it is removed, shall preclude any or all claim and demand for any payment whatsoever under or by virtue of this contract."

This is sufficiently explicit, and does not need comment. It will be noticed that the covenant is much stronger than in *Schroeder vs. Galland*, the difference being that in the one case there is an express covenant not to file liens, while in the other the covenant is only to be implied from language about which laymen might differ, and, possibly, lawyers.

In *Murphy vs. Morton*, 139 Penna. St. R., 345, it was held that a covenant by the contractor for the erection of a building that, before the final payment shall become due, he will furnish releases from all persons having a right of lien, will not protect the owner from mechanics' liens for work done or materials furnished in good faith by sub-contractors and material men, and was not a covenant on the part of the contractor not to file a lien. On the contrary, there is a recognition of the right of sub-contractors and material men to lien the building. The provision of the contract that before the contractor shall receive his last payment he shall furnish releases from all persons entitled to file liens, is a recognition of the right to file them.

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In *Willey vs. Topping*, 146 Penna. St. R., 427, the original contract for the erection of the building contained no prohibition of mechanics' liens, and we held that a subsequent release of his right did not prevent the filing of a lien by a material man, though the materials were furnished after the release was delivered; that while a sub-contractor is bound by the terms of the original contract between the owner and the contractor, he is not bound to inquire from time to time whether such contract has been changed or modified. To the same point is *Cook vs. Murphy*, 150 Penna. St. R., 41.

In *Moore vs. Carter*, 146 Penna. St. R., 492, it was held that a stipulation that the contractor shall furnish releases from sub-contractors, etc., before the last installment of the contract price shall be paid, will not preclude the filing of a mechanics' lien by the contractor in advance of the furnishing or procuring of such releases.

In *Lloyd vs. Krause*, 29 W. N. C., 429 [147 Penna. St. R., 402], the clause in the contract which was relied upon to defeat the claim was as follows: "Neither shall there be any legal or lawful claims against the party of the first part in any manner, from any source whatever, for work or materials furnished on said work." It was held that these words did not contain a stipulation that there shall be no mechanics' liens filed against the building, nor that the building shall be delivered to the owners free from any liens or incumbrances. It will be noticed, however, that this provision is at least as strong as the one in *Schroeder vs. Galland*, which was held sufficient to prevent the sub-contractor from filing a lien. In that case the contract was that the building should be delivered to the owner "free of all liens and incumbrances that might arise under any action of the party of the second part or his legal representatives under this contract."

In *Bolton vs. Hey*, 30 W. N. C., 29 [148 Penna. St. R., 156], the building agreement, after stipulating for the time and modes of payment, provided as follows: "It is further agreed that the said building shall be built, finished and delivered over to the party of the first part free of all liens and incumbrances or any claims whatever that might arise under any action of the party of the second part or his legal representatives under this contract; and that the provisions of the ninth section of this contract shall not be taken to subject the

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said building, to any liability for the payment for labor or materials furnished in or about the erection thereof, or the said party of the first part to any liability therefor other than the payment of the contract price to the said party of the second part as therein provided." It was held that the above words constituted an implied covenant against filing liens, and that a sub-contractor could not recover against the owner for materials furnished. It will be noticed that there is something more here than an agreement to deliver the building to the owner free of all liens and incumbrances. There is a further stipulation that the provisions of the ninth section of the contract shall not be taken to subject the building to any liability for the payment of labor or materials furnished in or about the erection thereof. While a lawyer may be able to find in the language quoted an implied covenant against filing liens, the mechanic or material man might be misled thereby. The covenant to deliver the building free of incumbrances is not a covenant against filing liens, as we have said in a number of cases, while the subsequent provision that nothing in the contract shall subject the building to liens for labor or materials is not free from criticism. It is not the contract that subjects the building to liens, but it is the law which renders it so liable, and the contract should have expressly prohibited the filing of any liens. This case stands upon the very border, and goes further in sustaining an implied covenant against filing liens than we are now prepared to go.

In *McElroy vs. Braden*, 152 Penna. St. R., 78, there was an express agreement that no liens were to be filed, either by the contractor or sub-contractor, and the principal contention was whether it is necessary that such an agreement should be in writing. The court below held that it was not essential that the stipulation referred to should be in writing, but it must be definite and explicit. This ruling was affirmed by this court. We could not say as a matter of law that the agreement between the owner and contractor must be in writing, although few prudent business men would be willing to trust to the uncertain testimony of witnesses for the details of such an important transaction.

The learned Judge below held, as has been already stated, that the case in hand was ruled by *Dersheimer vs. Maloney*, 143 Penna. St. R., 532. It remains to consider that case with *Tebay vs. Kirkpatrick*, 146 Penna. St. R., 120, which was ruled upon the former case.

The contract in the case in hand, so far as this question is con-

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cerned, is substantially the same as in *Dersheimer vs. Maloney*, and was evidently prepared in accordance therewith. The controlling portions of the contract in that case, as we find from the report of it in 143 Penna. St. R., is as follows: "Eighty-five per cent. will be paid as the work progresses on labor and materials, in monthly payments, according to and upon the estimate of the architect. The proprietor reserves the right to pay bills, deducting fifteen per cent. until completion. Provided, that in each case of payment a certificate shall be obtained from the architect; * * * and provided, further, that in each case a certificate shall be obtained by the contractor from the clerk of the office where liens are recorded, signed and sealed by the clerk, that he has carefully examined the records and finds no liens or claims recorded against said work; neither shall there be any legal or lawful claims against the contractor in any manner, from any source whatever, for work or materials furnished on said works."

"7. The proprietor will not in any manner be answerable or accountable for loss or damage that shall or may happen to said work or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing said works, or for injury to any person or persons either workmen or the public, or for damage to adjoining property." * * *

This was held to be an implied covenant against the filing of liens. That it was a close case may be inferred from the language of this court, where it was said: "While the language of the contract in that case (*Schroder vs. Galland*) differs from that employed in the agreement before us, we have no doubt the parties intended to provide against the filing of liens; and while they have not done so in express terms, we think that by fair intendment the words used necessarily include both liens and personal liabilities. The owner is not to be "answerable or accountable * * * in any manner" for any liabilities, etc. If this is not an implied covenant against filing liens, then the owner is "answerable or accountable" in at least one mode or manner; not liable in person, it is true, but in property, which is equally efficacious. Again, in the second clause, the inhibition is: "Neither shall there be any legal or lawful claim against the contractor in any manner, from any source whatever, for work or materials."

While it may be true that the parties to this contract intended

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to provide against the filing of liens by sub-contractors, the stronger light which has been thrown upon this question leads us to the conclusion that it is not as explicit as it might and ought to have been. Nor do we attach much importance to the words that there shall not be any legal or lawful claim against the contractor. It was not in the power of the owner or contractor, or of both of them, to prevent claims being brought against the contractor. It is the owner, or rather his building, which is intended to be protected by this and similar covenants.

The other ground, upon which this decision was based, that the owner is not to be "answerable or accountable * * * in any manner" for any of the materials, etc., is not free from criticism. An examination of that clause of the contract shows that it is at least capable of another interpretation, and that the owner was stipulating not that he would not be accountable for materials furnished to the building but that he would not be responsible "for loss or damage that shall or may happen to said work or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing or completing said work, or for injury to any person or persons either workmen or the public, or for damage to adjoining property."

We think this language may fairly be interpreted to be a covenant that the owner shall not be responsible for any loss occasioned by the injury or destruction of the building, or the materials composing it, during the erection and construction. And the further covenant that the owner will not be responsible to any person or persons either workmen or the public, or for damage to adjoining property, strengthens this view.

The essential portions of the contract in the case in hand are as follows:

"VI. The owner will not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing said work.

"VII. The said parties of the second part agree to take, use, provide and make all proper, necessary and sufficient precautions, safeguards and protections against the occurrence or happening of any accidents, injuries, damages or hurt to any person or property

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during the progress of the entire work, and for all such accidents, injuries, damages or hurt the said parties of the second part alone to be responsible, and not the said party of the first part or the architect; it being agreed that the work to be done shall be entirely under the control of the parties of the second part, except so far as provision is herein made for the instruction thereof of the architect."

The two paragraphs above quoted must be read together. Thus considered, it is a covenant that the owner will not be responsible for any "loss or damage" that shall or may happen to the said building or to the material or other things used and employed in erecting it, and that the contractor shall be responsible for all accidents, injuries, damages or hurt to any person or property during the progress of the entire work.

That the contract in question is fairly subject to this construction is a sufficient reason why it should not be held to bar the right of the sub-contractor to file a lien. An examination of this class of cases creates a feeling of surprise that if parties intended to covenant against the filing of liens they should employ such ambiguous language, when three lines, clearly expressed, would remove all doubt upon this subject. It is sufficient to say that no lien shall be filed against the building by either the contractor or sub-contractor.

Tebay vs. Kirkpatrick, *supra*, was decided upon Dersheimer vs. Maloney, *supra*, and the contracts in the two cases are substantially similar. The criticisms of the latter case apply equally to the former.

We are of opinion that in order to prevent the contractor or sub-contractor from filing a lien against the building there must be an express covenant against liens, or a covenant resulting as a necessary implication from the language employed; and that the implied covenant should so clearly appear that the mechanic or material man can understand it without consulting a lawyer as to its legal effect.

In the case in hand there is no such express covenant, nor is such covenant to be reasonably implied from the terms of the contract. It was, therefore, error to instruct the jury to render a verdict for the defendant.

The judgment is reversed, and a *venire facias de novo* awarded.

ESTATE OF JAMES CASCADEN, DEC'D.

Wills — Vested estates — Time of distribution.

Testator by his will directed his executors to invest the residue of his estate, the income to be paid to his wife, until his youngest child should arrive at the age of twenty-one years. Testator further directed as follows: "When the youngest child arrives at the full age of twenty-one years, then I direct all my said real estate and investments to be converted into money by my executors and divided as follows: I give and bequeath to my wife out of said moneys the sum of fifteen thousand dollars, and all the rest, residue and remainder I direct to be divided among my said children share and share alike, subject to the deduction which I have before directed to be made. Should any of my said children die before the youngest child arrives at the age of twenty-one years, leaving children, then the said share shall be divided among said children share and share alike; or if he or she shall die without leaving children, then his or her share shall be divided among the remaining children share and share alike." One of testator's daughters married and died, leaving surviving her husband and one child, who also died before the youngest of testator's children came of age. *Held*, that the gift being to testator's children as a class, the gift was contingent upon a child living to the period of distribution, or leaving a child who should live until such period: *McClure's Appeal*, 72 Penna. St. R., 414, distinguished.

In this case the child of testator's daughter having died before the period of distribution, the husband took nothing as the heir or next of kin of his child.

APPEAL from the decree of the Orphans' Court of Montgomery county.

Charles Hunsicker, Esq., for appellants.

William W. Porter, Louis M. Childs and Frederick J. Geiger, Esqs., for appellee.

Opinion of the court by PAXSON, C. J., February 13, 1893.

The will of James Cascaden, after giving certain pecuniary legacies, which do not concern this case, directs that all the rest, residue and remainder of his personal estate shall be invested by his executors in such good and reliable securities as they may approve, the income from which and the income from all his real estate he gives to his wife, Mary Jane, until his youngest child shall arrive at the age of twenty-one years, for the support of herself and the support and education of each of his minor children during his or her minority. The will then further provides:

"Item. As each child arrives at the age of twenty-one years he or she shall receive the sum of one thousand dollars, which I direct my executors to collect by sale of a sufficient amount of said investments or otherwise, and pay over and charge the same against the final account of each.

"When the youngest child arrives at the full age of twenty-one years, then I direct all my said real estate and investments to be

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converted into money by my executors and divided as follows: I give and bequeath to my wife out of said money the sum of fifteen thousand dollars, and all the rest, residue and remainder I direct to be divided among my said children share and share alike, subject to the deduction which I have before directed to be made. Should any of my said children die before the youngest child arrives at the age of twenty-one years, leaving children, then the said share shall be divided among said children share and share alike; or if he or she shall die without leaving children, then his or her share shall be divided among the remaining children share and share alike."

The contention in this case arises in the following manner: Annie M. Cascaden, one of the testator's children, intermarried with Antone Maurise, and died January 6, 1884, leaving surviving her husband and one child, Annie Maurise, who was born December 31, 1883, and died in Philadelphia in June, 1885. Mrs. Maurise was of legal age at the time of her death. The youngest child of the testator came of age on June 23, 1888. It thus appears that both Mrs. Maurise and her daughter, Annie, died prior to the time fixed by the testator for the distribution of his estate. Letters of administration upon the estate of Annie M. Maurise, the younger, were granted by the Register of Wills of Philadelphia to her father, Dr. Antone Maurise, on October 13, 1891. The latter now claims, as heir or next of kin of his child, the share which the mother would have been entitled to had she lived until the period of distribution had arrived. The learned court below awarded the share to him as administrator, upon the ground that each of the children of testator took a vested interest in the estate, and that the interest of his daughter, Annie, having vested, descended to her daughter under the intestate laws.

In cases of doubt the law favors the vesting of an estate at the earliest possible time where it does no violence to the expressed intention of the testator: *Letchworth's Appeal*, 30 Penna. St. R., 175; *McClure's Appeal*, 72 Id., 414. The latter case was strongly pressed upon our attention as decisive of this question. It is conceded that its facts in most respects closely resemble those in the case in hand. In that case the testator directed the residue of his estate, if any, remaining after the death of his wife, to be equally divided between his nephews and nieces, individuating them by their names, and declaring that each is to have an equal share. It was said in the opinion

of the court: "The gift is to his nephews and nieces not as a class but by name as individuals, without words of survivorship, and with no bequest over, in the event of their death, in the life of the widow." Herein that case differs from the one in hand. In the latter the testator does not individuate his children and give each one a share by name. In fact, the names of his children are nowhere mentioned in the will. The gift to them is to a class, and the distribution is to be made among them share and share alike when his youngest child shall arrive at the age of twenty-one years; and the share of such child as shall die before that period without leaving children shall be divided among the remaining children share and share alike. It is obvious that had Mrs. Maurise died prior to the distribution without leaving children, her share would have gone to the surviving brothers and sisters under the terms of the will. But it was contended that because she left a child surviving her, her interest in the estate vested in her, descended to and vested in her child. Had this child lived until the period of distribution there can be no doubt she would have been entitled to her mother's share. As she died before that time, to hold that she is entitled to her mother's share is to accord to her a higher estate than her mother possessed. The estate of the latter was contingent upon her living until the youngest child came of age. Upon her death her interest passed to her child; but no higher interest passed than the mother possessed. The daughter was substituted for the mother. She stands in her mother's shoes, and whatever would defeat her mother's estate must necessarily defeat her estate. Had she lived, as before observed, she would have been entitled to the mother's share upon distribution. The provision in the will in regard to any of the testator's children dying and leaving children surviving, means children surviving at the time of distribution. Were it otherwise, the testator's grandchildren would take a higher and better estate than the one he gave his own children. We can not impute such an intent to him, nor do we think it can be fairly gathered from the language of the will.

We have examined with care the numerous authorities cited by counsel on either side of this question, and fail to find any one of them that distinctly rules this case. For this reason we have not discussed them.

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We are of opinion that the whole balance of the estate should have been awarded to the children of the testator who were living at the date when the youngest child came of age.

The decree is reversed at the costs of appellee, and the record remitted with instructions to make distribution in accordance with this opinion.

Court of Common Pleas of Montgomery County.

IN EQUITY.

HAVERFORD ELECTRIC LIGHT COMPANY VS. WILLIAM R. HART, AND
WILLIAM R. HART, ATTORNEY IN FACT FOR THE HEIRS OF
REBECCA C. ASHBRIDGE.

Electric light companies may locate their poles on the side of a country road, but the abutting land owner is entitled to compensation for any damage he may sustain by reason of such location.

While electric railways may use the streets of a city without any compensation to abutting owners, such use is unlike that which an electric light company makes of a highway. Light by electricity has no connection with the original design of a public road; it is a use of the road not in the contemplation of the owner of the land and the authorities when the land was appropriated.

MOTION to dissolve preliminary injunction. No. 1, December T., 1891.

Henry C. Boyer, Esq., for plaintiff.

Charles Hunsicker, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., March 7, 1892.

The complainant's bill sets forth that the Haverford Electric Light Company was incorporated under the act of the 29th of April, 1874, and the several supplements thereto, to furnish electricity to the public, in the township of Lower Merion, for the purposes of light, heat, and motive power. It is also shown that the complainant company surrendered its charter under the provisions of the act

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of May 8, 1889, P. L. 136, and received new letters patent under the said act.

The company erected an electric plant at Haverford College station, in said township of Lower Merion. Poles were also erected on the sides of the public highways, whereby the electric wires are supported which supply or carry the electricity to the consumers. There are no cities or boroughs within the township limits, but the poles were placed within the limits of the public highways by permission of the township supervisors. A line of poles was erected on Montgomery avenue, one of the public roads of said township. Three of the poles of this line were placed in front of defendant's property but within the limits of the highway, and a few feet from defendant's fence line. The street or road is forty feet wide. The defendant, William R. Hart, cut down these poles; the company replaced them, and then secured a preliminary injunction to restrain him from further interference with the poles. The injunction was to continue for five days, unless cause be shown for its further continuance. The poles have been in use since July, 1891, except during the period of Mr. Hart's interference. Shall we allow the defendant to remove the poles?

Counsel for complainant in his argument contends that William R. Hart's title does not extend to the middle of the highway. Under the affidavits before us this ownership to the middle of Montgomery avenue is either in Mr. Hart or his lessor, Mrs. Ashbridge. The real parties in interest are therefore represented before us.

Counsel for defendant claims that the poles in controversy should have been located on the other side of the avenue, because the opposite owner is a customer of the company while the defendant is not. If the company has the right to occupy the sides of the road for its poles, we can not say that their present location shows such an abuse of discretion as to call for judicial interference.

William R. Hart, the defendant, is the owner of a country residence. The buildings stand back some distance from Montgomery avenue. He alleges that these poles disfigure his property and greatly depreciate its market value. Numerous other affidavits are filed which sustain this view.

The owner of land traversed by a public road has the right to use the land on which the road is located for any purpose that will not impede or interfere with the public travel. The fee still remains

in the land-owner, and the public acquires no more than the free and uninterrupted use of the highway for the purposes of passage. For such use he was compensated. If any additional servitude is imposed, for purposes distinct from the use of the land as a highway, additional compensation must be made. It is said that electric railways may locate their poles on the streets of a city without any compensation to the abutting owners: *Lockhart vs. Craig Street Railway Co.*, 139 Penna. St. R., 419. Suppose this rule is applicable to a country road, how does it meet complainant's case? Street railways, whether propelled by horses or electricity, use the highways for the purposes of passage. We may say such use is in accord with the original design of the road; it is but a means of public transportation and accommodation. When compensation for use of the land was made the owner was bound to recognize that his property would be subjected to any method of passage that is developed in the progress of time, and the use of the road for the cars carries with it the use of the proper apparatus for moving them.

But what connection has an electric light company with the original design or purpose of a public road? There is nothing in the system of lighting by electricity that requires a public highway. The poles might be placed outside of the roads and answer every purpose. The act of May 8, 1889, allows such companies to enter upon any public street, lane, alley or highway, because the streets afford a convenient location or perhaps because such method may cause the least injury to private property. Whatever the purpose of the Legislature may have been, it seems clear to us that the use which an electric light company makes of a public highway has no connection with the purposes of a public road, and was not a use in the contemplation of the owner of the land and the public authorities when the land was appropriated.

The poles occupy the defendant's ground; and if any injury is done, the constitutional provision requires just compensation to be made. We can not distinguish this injury from that which is occasioned by the laying of gas pipes in a public road for the purposes of carrying natural gas from the well to a city some miles away. The latter injuries may differ from the former in degree but not in kind. Such gas-pipes may not be laid without first paying or securing compensation to the abutting land-owner: *Sterling's Appeal*, 111 Penna. St. R., 40. Poles with their hanging wires and

cross-arms often work greater injury to a property than a gas-pipe buried under the road-bed. Ground is occupied, trees along the highway are interfered with, access to the property is impeded, the view is obstructed, and an unsightly structure is presented to the eye. These are matters of considerable moment, when, as in the present case, the abutting owner is the occupant of a fine suburban mansion.

Telegraph and telephone companies may not occupy the sides of a highway without making compensation: *Broone vs. New York and New Jersey Telephone Co.*, 42 N. J. Equity, 141; *Chesapeake Telephone Co. vs. Mackenzie (Md.)*, 21 Atl., 690. In Massachusetts it was held by a majority of the court that roads and streets may be used for telegraph poles without any liability to compensate abutting owners. The decision was based upon the conclusion that such "use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken": *Pierce vs. Drew*, 136 Mass., 81. As already shown, this plea can have no application to electric light companies.

We conclude that the defendants are entitled to such damages as they may sustain by the location of the poles and wires of plaintiff company. We add what was said in *Sterling's Appeal*, *supra*: "As to streets and alleys in cities and boroughs, there are reasons why a different rule to some extent should prevail."

And now, March 7, 1892, the injunction heretofore awarded will be dissolved unless the complainants will within fifteen days from this date tender to the defendants a bond in one thousand dollars with surety conditioned for the payment of such damages as may be legally recovered against them by the said defendants by reason of the erection of the poles aforesaid.

Orphans' Court of Montgomery County.

ESTATE OF WISTAR MORRIS, DEC'D.

A direction to invest and add annually to the estate fifty per centum of the surplus income is a direction for accumulations prohibited by the act of April 18, 1853.

Where the direction to accumulate is transgressive, and there is no method by which the share of the minor at his arrival at legal age can be ascertained, the direction fails altogether.

As a general rule, survivorship, where there is no special intention manifested to the contrary, is referable to the time of the testator's death; but this rule has no application where there is a disposition of income accruing after the testator's death. In the latter case survivorship relates to a time when there is something upon which the will can operate.

EXCEPTIONS to auditor's report.

John Blanchard and *Geo. Tucker Bispham, Esqs.*, for exceptions.

Girard Life Insurance, Annuity and Trust Company, of Philadelphia, trustee.

Childs & Evans, Esqs., for Charles Wood, administrator of Mary H. M. Wood.

Opinion of the court by SWARTZ, P. J., April 13, 1893.

Wistar Morris died March 23, 1891. He left to survive him a widow, Mary Morris, and a daughter, Mary H. M. Wood, who was intermarried with Rev. Charles Wood.

Mrs. Wood died on the 25th day of June, 1891. Her husband and two children survived her.

The will of Wistar Morris provides, *inter alia*, as follows:

"All other of my estate, real and personal, whatsoever and wheresoever, not designated and noted heretofore—the Green Hill farm estate, in Lower Merion, subject to the life residence of my sisters, and the directions heretofore given in respect to my wife and my daughter occupying of the home residence, and the disposition and descent of same to my grandchildren, I give, devise and bequeath to my executors, in trust (subject to the annuities to be paid), who shall, within one year after my decease, select, nominate and appoint one of the trust companies of the city of Philadelphia trustee, to collect the interest, dividends and rents, and other income of

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the estate, attend to the repair and maintenance of the dwellings, farm buildings, and estate in general, and shall, from the income, cause to be paid:

"First. The annuity of twelve thousand dollars, in even and equal payments of one thousand dollars per month, due to my sisters, Hannah Morris and Jane Morris, or the survivor of them, under terms of agreement for payment of said annuity and sale of stocks, bonds, etc., to me.

"Second. To pay to my wife, Mary Morris, during her life, an annuity of fifteen thousand dollars, in even and equal monthly payments of twelve hundred and fifty dollars each, for her support, household expenses, carriages and horses, servants, coachman, and the gardeners in charge of the green-houses and grounds around the house.

"Third. To pay to my daughter, Mary H. M. Wood, during her life, an annuity of ten thousand dollars, in even and equal payments of eight hundred and thirty-three thirty-three-hundredths dollars; and should my said daughter die before her youngest child shall have arrived at legal age, to pay the said annuity of ten thousand dollars to my son-in-law, Charles Wood, or to the guardian that may be of said children.

"Fourth. After the payment of the several annuities, and the needful repairs and improvements on and to the estate, there be a surplus of income, then and in that case fifty per cent. of said surplus shall be invested and added to the estate, and the balance, fifty per cent., shall be paid to my wife and daughter, or to the survivor of them, to and for their own proper use.

"When the youngest of my grandchildren that may be shall have attained to legal age, the two elder being provided for as to homestead, as heretofore provided, I will that locations be selected on the remainder of the Lower Merion tract for such grandchildren to build upon and reside on. Should no such future heirs be, then the said part of the farm to be divided and to be added to the tracts allotted to the two elder grandchildren, or their heirs, or the survivor of them, in fee, and the estate, real and personal, to be divided equally between such heirs, children of my daughter, Mary H. M. Wood, or the survivor of them, the children of such grandchildren, should there be such, to inherit the share that would have been to the parent of such child or children."

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The executors, under the provisions of the will, selected the Girard Life Insurance Annuity and Trust Company to act as the trustee to hold the testator's estate.

The executors' account for the first year showed surplus income, after paying all matured annuities, amounting to \$32,466.83. One-half of this sum was claimed by the said trustee under the provision of the will directing accumulations of surplus income. The auditor held that the direction to accumulate was in conflict with the act of April 18, 1853, Sec. 9, and distributed to the widow and the administrator of Mary H. M. Wood this fifty per centum of the surplus income.

We find no error in this disposition of the fund, and can add little to what the auditor has so well said.

The validity of the direction to accumulate must be tested by the circumstances as they existed at the time of the testator's death; if invalid, then a subsequent change of circumstances will not cure the transgression. The validity is to be tested by possible and not by actual events: *Coggin's Appeal*, 124 Penna. St. R., 10.

Let us apply this test to the will before us.

The will directs the accumulation of the annual surplus income after the payment of certain annuities. As long as any annuity survives the surplus may continue and the accumulations must follow—that is, the accumulations are to continue during the lives of the four annuitants and the life of the longest liver.

It is said, however, that distribution of the estate is directed to take place "when the youngest grandchild that may be shall have attained legal age." The testator may have contemplated the death of his sisters, widow and daughter before the youngest grandchild should reach his majority; but the accumulations terminating at either period may transgress the law. Under either interpretation the possible events may require the accumulations to continue for more than twenty-one years beyond testator's death, and thus violate the law.

The exceptants contend that the direction to accumulate is not wholly bad, even if transgressive; that it is good for the period covering the minority of the children living at the testator's death, and inures to the benefit of the two children of Mrs. Wood.

The able argument of the learned counsel for the trustee overlooks, as it seems to us, one very important provision in the will.

Their argument assumes that there is a direction to accumulate for the grandchildren of the testator; but the will directs, "then and in that case fifty per cent. of said surplus shall be invested and added to the estate." The surplus is to swell the testator's estate. It becomes part of the estate, and is not the money of the grandchildren; they are not even to receive it, except so far as they may share in the final distribution of the estate. That the accumulations, if allowed to stand, may eventually reach the grandchildren, can not alter the case. The act of 1853 recognizes but a single class of persons in whose favor accumulations are permitted. "They must be minors; they must also be such persons who will be entitled to take the rents and profits from which the accumulations arise when the gift or grant goes into effect, though at the time they have passed their minority": *Washington's Estate*, 75 Penna. St. R., 102; *McKee's Appeal*, 96 Id., 277. The latter case offers a complete answer to the exceptant's position; in it there was no direction to accumulate for the estate except by implication, and the accumulations, if allowed, were sure to reach Mr. McKee's children. And yet the direction was held to be transgressive of the act of 1853, because in effect it was a direction to swell the estate of the testator, and not to accumulate income for minors.

It is argued that this case does not decide that the accumulations during the minority of the children of Frederick McKee were bad. We can not so read the opinion. On the contrary, the judgment of the court is based upon the conclusion that the entire direction is void because of the accumulation for the benefit of the estate. The following language admits of no other interpretation: "No ingenuity can reconcile a provision of this kind with the statute, and it must therefore fall. Had we to deal merely with time, the act itself would settle any difficulty arising from the matter, for it avoids only the excess; but where the effect of the provision is solely to swell the bulk of the estate, it is so diametrically opposed to the intent and spirit of the statute that it can not be sustained."

We do not concede that the will before us directs in effect accumulations for the grandchildren, and to continue till such youngest grandchild that may be born shall attain twenty-one years; on the contrary, the will says the accumulations shall be added to the estate. They are not specifically given to any one. But if we should concede the position assumed by the exceptant, still the case is not free

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from difficulty. If the excess only as to time and children born after testator's death is bad, how shall we separate the good from the bad? The accumulations, under the exceptant's theory, as to Charles Morris Wood, the oldest grandchild, terminate with his majority. But his share of the accumulations might not then be ascertainable, for his mother might have lived beyond that period, and the persons who under the will are to share equally the estate, including the accumulated income, could not be known until the possibility of other grandchildren terminated. The amount of his share is dependent upon the birth of other grandchildren; it is not an independent and severable gift. Whether he shall receive at his majority one-half of the accumulations or one-tenth of them might not then be ascertainable. We can not award to him at that period the full one-half of the entire accumulations on the ground that the excess is void. To do this is to ignore the direction of the will as well as the act of 1853, which provides how the forbidden accumulations shall be distributed. The case is unlike that cited by counsel where the "testator gave £1500 to each of X's children who reach twenty-five years"; and it was held that each child born before the testator's death upon reaching twenty-five will take the legacy, although those born after will not.

In *McBride's Appeal*, 31 W. N. C., 333, the gift was for "the use of A, B and C, children of my son J., and such other children, lawful issue, which he may have, the said sum to accumulate until the youngest surviving of these children shall have attained the age of twenty-one years." The accumulations were sustained because the word "these" was held to refer to the children designated by name. If the word is referable to the whole class, the accumulations continue during the minority of the youngest child that may be born. Under the latter interpretation the learned auditing judge held that the direction to accumulate would fail altogether. To what children did the testator refer? This was the material and controlling question in the higher court.

If the exceptant's contention before is sound, then under either interpretation the accumulations were good during the minority of the children born in the life-time of the testator, *Francis McBride*, and there was no real ground of controversy. We think the Supreme

Court sustained both the reasoning and conclusion of the lower court.

We conclude that the accumulations in the will of Wistar Morris can not be sustained, because it is impossible to make any computation that will bring any part of them within the protection of the act of 1853. If the gift is to a class, and is void as to any of the class, it is void as to all: Coggin's Appeal, *supra*; Smith's Appeal, 88 Penna. St. R., 492; Hillyard vs. Miller, 10 Id., 334. Smith's Appeal, it may be, is qualified by later adjudications; but the point for which it is now cited was reaffirmed in Coggin's Appeal.

We prefer, however, to rest our adjudication upon the first ground—that is, the accumulations are void because directed for the benefit of the estate and not for the only class of persons recognized by the act of 1853.

As no part of the surplus income now before us is claimed by the trustee to meet "annuities, needful repairs and improvements," it is presently distributable. It seems the future income will greatly exceed the needs of the trust. There is, therefore, no occasion for the retention of the present surplus income.

If the will makes no disposition of the accumulations, there is an intestacy as to them; if the will disposes of them under the final clause, they form a part of the residuary estate. In either view the law gives them to the widow and administrator of Mrs. Wood. If the fund to be accumulated is residuary, the void accumulations go to the heir or next of kin: McKee's Appeal, *supra*; Grim's Appeal, 109 Penna. St. R., 396; Theobald on Wills, 448; Redfield on Wills, Vol. 2, page 840. The auditor's distribution is therefore approved.

The remaining fifty per centum of the surplus income was distributed to the widow and administrator of Mrs. Wood, upon the theory that survivorship in this clause of the will referred to the individual person who of the two named should turn out to be the longest liver and not to the individual who should survive testator.

This interpretation, we think, conforms to the intention of the testator. We must not forget that the will contains the language and expression of a lay mind, no doubt unacquainted with the technical signification of the legal term.

It is true, as a general rule of law, that words of survivorship in a will should, where there is no special intention manifested to the contrary, be taken to refer to the death of the testator. Where there is a disposition of income accruing after the testator's death this rule

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has no application, unless indeed the disposition of income is in itself evidence of the manifest contrary intention.

At the testator's death there is no income for distribution, and it seems to us survivorship must relate to a time when there is something upon which the will can operate.

We are satisfied that the able report of the learned auditor should be confirmed.

And now, April 13, 1893, the exceptions to the auditor's report are dismissed and the report is confirmed.

Court of Common Pleas of Montgomery County.

HANNAH WOODS, TO USE, ETC., TRUSTEES, VS. N. A. IRWIN, EX'TRIX.

One to whom the management of any business is confided can not create other relations which will put him in an attitude of hostility to his principal, or *cestui que trust*; and compromises by which money is gained or saved by executors, administrators or trustees, inure to the benefit of those for whom they act and not for the benefit of the trustee.

An executrix entrusted the management of the estate to her attorney, who procured a claim for \$10,000 to be assigned to B, to the extent of \$1,000, the amount paid for it by B, and the balance for the benefit of A, the executrix, who was not informed of the transaction. Suit having been brought on the claim against A as executrix, her attorney advised her to confess judgment for \$15,525, being amount of entire claim and interest. Creditors petitioned the court to declare the judgment invalid for more than B's interest therein, which was done.

SUR RULE to open judgment. No. 19, December T., 1886.

Childs & Evans, Esqs., for plaintiff.

Charles Hunsicker, Henry Freedley and Geo. W. Rogers, Esqs., for defendant.

Opinion of the court by WEAND, J., April 13, 1893.

On October 2, 1874, Ninian Irwin borrowed from Hannah Woods five bonds of \$1,000 each of the Danville, Hazleton and Wilkesbarre Railroad Company, which he agreed to return within three months.

On October 15, 1874, Irwin borrowed ten more of the same bonds of the same denomination, which he agreed to return in six

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months. Irwin died in 1877, without having returned either of the bonds.

Mrs. Woods after the death of Irwin assigned one-half interest of her claim to John Q. Lane. Both parties afterward, February 9, 1881, assigned the whole claim to one J. Wilson Irwin for \$1,000.

Ninian Irwin left a will in which he appointed his wife, N. Adeline Irwin, his executrix. Mr. G. R. Fox acted as counsel for Mrs. Irwin in the settlement of the estate, and appears to have had the entire management of it. He also acted as counsel for Mrs. Woods to collect her claim from the estate, and after the assignment to J. W. Irwin he retained possession of the papers, thus acting for all parties interested.

The negotiation for the purchase of the claim from Mrs. Woods and Mr. Lane was through Mr. Fox, who paid the money to Mr. Lane. Upon the back of the assignment from Woods and Lane to Irwin, and of same date, appears the following in Mr. Fox's handwriting: "This purchase was made one-half with money of J. Wilson Irwin and one-half with money of Milton Stewart, and to be held by J. W. Irwin in trust for Mrs. N. Adeline Irwin's use, and to be hers on refunding out of the moneys when collected \$500 to each of said parties."

There also appears on this paper as of same date another endorsement, as follows: "This assignment, with the accompanying papers, is left with me for the collection of the money from the estate of Ninian Irwin, deceased, and out of the net proceeds less counsel fees and expenses to pay J. Wilson Irwin \$500 with interest from February 9, 1881, and to Milton Stewart \$500 with interest from February 9, 1881, if so much shall be realized; and if less, then to divide the amount received between them pro rata; and if more than a sum sufficient shall be realized to pay them in full, then to pay the net balance to George Irwin, son of said Ninian Irwin."

Neither George Irwin nor Mrs. N. A. Irwin were aware of these endorsements, or that they had any interest in the claims, until after judgment was obtained. The Danville, Hazleton and Wilkesbarre Railroad defaulted in the payment of its bonds. Under foreclosure proceedings the road was purchased by a syndicate of the bondholders, who reorganized it as the Sunbury, Hazleton and Wilkesbarre Railroad, and sold it to the Pennsylvania Railroad, who gave in payment two series of bonds guaranteed by themselves. The old

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bonds were convertible into the new, but by reason of Ninian Irwin's default Mrs. Woods lost the benefit of such right to convert. Mr. Fox placed the claim in the hands of another attorney, who then brought suit in the name of "Hannah Woods, to the use of J. W. Irwin and Milton Stewart, trustees." In this suit Mr. Fox acted as attorney for Mrs. Irwin as executrix, and advised her to confess judgment, which she did for \$15,525, said suit being to December Term, 1886, No. 19.

Mrs. Irwin says in her testimony that she did not then know that the judgment was for her benefit, and that if she had known it she would not have confessed judgment for \$15,000 when only \$1,000 was paid.

Subsequently J. M. Albertson & Sons, who held a judgment against Ninian Irwin, petitioned the court to open the judgment to allow them to interpose the plea of the statute. The judgment was opened, and on a trial the court directed a verdict for defendant. This judgment was reversed by the Supreme Court. See Woods and Irwin's Appeal, 141 Penna. St. R., 278.

Mr. Stewart, having declined to appeal the case to the Supreme Court, was induced by Mr. Fox to assign the claim to George Irwin, who indemnified him against costs. Albertson & Sons then applied to have the judgment opened, upon the ground that it was fraudulently confessed by the executrix and is held and enforced against the decedent's estate for a sum many times actually due thereon and for her own personal use and benefit, etc. The court thereupon awarded an issue to determine several questions of fact. Those found in favor of the contestants, and upon which and for other reasons they ask the court to open the judgment, are, first, that the claim was purchased for the benefit of Mrs. N. A. Irwin, and that she is the legal or equitable owner of part of said claim.

George Irwin distinctly asserts that he knew nothing of any interest he might have had in this claim apart from the assignment to him on April 11, 1890, from Milton Stewart, who describes himself as trustee who survived J. W. Irwin; and this assignment, it is testified, was for the purpose of carrying the case to the Supreme Court after Mr. Stewart had declined so to do.

There is no evidence to show that Mr. Fox was authorized to

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mark the claim to the use of George Irwin; and the only interest, therefore, the latter can have is to the extent of \$500. Mrs. Irwin, therefore, stands as claimant for all that may be recovered over and above \$1,000, with interest.

Even if we concede that the purchase for or assignment for the use of Mrs. Irwin was a revocable trust, we must still regard it as in full force, for nothing has been done to show that such right to revoke was ever claimed or exercised; and the suit which has passed into judgment was brought by Irwin and Stewart, trustees, thus admitting that the claim was held for the use of some one else; and as the endorsement of Mr. Fox was directed to be made for Mrs. Irwin's use by the purchaser, she must be regarded as having an interest therein even without the finding of the jury upon that point. Mr. Fox in his testimony says: "The assignment was left in my hands, where it has been ever since, with directions that upon receipt of the money, if there was enough to pay the principal these gentlemen advanced and interest, that they should get their money back; and if not, it should be divided pro rata between them; and that if it realized more, that the excess I should pay for the benefit of Mrs. Ninian Irwin."

There can be no other conclusion drawn from the facts and circumstances of this case than that J. Wilson Irwin and Milton Stewart bought this claim for all it was considered by them then worth, not as investment or venture to make money for themselves, but with the understanding, intention and instruction that beyond the amount paid by them it was to belong to Mrs. Irwin, who was the executrix.

It must be conceded that if she had bought the claim for \$1,000, either directly or through her counsel, any advantage gained would inure to the benefit of the estate. It is only necessary to refer to Hill vs. Frazer, 22 Penna. St. R., 320, where it is said: "It is a universal rule that one to whom the management of any business is confided can not create other relations which will put him in an attitude of hostility to his principal, or *cestui que trust*"; and to Saeger vs. Wilson, 4 W. & S., 501, "compromises by which money is gained or saved by executors, administrators or trustees, inure to the benefit of those for whom they act and not for the benefit of the trustee."

In the case of Heager's Executors, 15 S. & R., 65, it was ruled: "In chancery the principle is one never departed from, and is as

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binding as any axiom of the common law—that he who takes upon him a trust, takes it for the benefit of him for whom he is entrusted, but not to take any advantage for himself. A trustee shall never be permitted to raise in himself an interest opposite to that of his *cestui que trust*."

Is the rule different where the purchase, as in this case, is made for the benefit of the trustee although without his knowledge? The application of the rule does not depend upon actual fraud. The doctrine is a rule of public policy necessary to preserve honesty and fidelity in the administration of trusts: Fisher's Appeal, 34 Penna. St. R., 29. It must not be forgotten that this whole business was managed by the counsel for Mrs. Irwin and the estate. It was his duty to protect the estate as much as it was the duty of the executrix, and his knowledge was her knowledge. As he could acquire no interest for himself antagonistic to the estate, neither could he do so for his client the executrix. She could not entrust him with the the sole management of the estate, and thus allow him to secure for herself an advantage which she was not permitted to do herself. He knew that the claim could be bought for \$1,000, and he secured its purchase with the object, as he says, of having it in friendly hands. But what kind of friendship would that be which would buy a claim for \$1,000, and then claim \$1,500 for it? The rule appears to be imperative that the trustee can not acquire an advantage or interest in a claim against the estate beyond the amount actually advanced for it. In this case, by inducing others to buy up the claim for her use, she was enabled to hold it until an advantage was secured hostile to the trust.

In the note to Keech vs. Sandford, 1 Leading Cases in Equity, Hare and Wallace's Notes, 3 Am. Ed., 91, it is said: "It is a principle firmly maintained in the equity jurisprudence of this country that a trustee is not at liberty to act or contract for his own benefit in regard to the subject of the trust, and that the advantage of all that he does about the trust property shall accrue to the *cestui que trust*, if the latter desire it. An independent interest in a trustee, in the subject of the trust, would in its very nature be an interest hostile to the *cestui que trust*; and that is repugnant to the relation which the trustee has assumed. So far as he acts about the property for himself, distinctly, he divests himself of the character of trustee for another; and this by his own act he can not do. When-

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ever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated. And in *Hill vs. Frazier*, *supra*, it was said: "One who is charged with the duty of paying debts can not make a speculation by buying them for his own use, whether he does it with his own money or not." The principle would be of little value if the act condemned could be done by the counsel for the trustee, even without her consent or knowledge. The counsel in many cases, as in this, transacting all the business of the estate, possessed of the knowledge thus gained, could thus secure claims for the trustee indirectly which the law would permit to be done directly. No better illustration of the mischief of such a rule could be had than is furnished in this case.

If the counsel had at once notified Mrs. Irwin of the assignment and her interest therein, she could have relinquished her claim or presented it for the benefit of the estate, and thus have acted as the law requires; and she states in her testimony that she would not have confessed the judgment for more than \$1,000 had she known the facts. By concealing them from her she was induced to claim an advantage for herself as against those she represented in her capacity of executrix. We are therefore of opinion that as to other creditors this judgment can not be enforced for more than \$1,000 with interest from February 9, 1881, but that it can be used until a dividend thereon pays that amount. We can not therefore open or set aside the judgment, but by virtue of the power vested in us as a court of chancery we can restrain collection beyond the amount really due. All the facts necessary to a proper understanding of the case appear from plaintiff's testimony on the rule to open the judgment.

And now, April 13, 1893, it is ordered and decreed that the judgment, Woods, to use, vs. Irwin, Ex'trix, &c., entered in Judgment Docket L 1, page 127, November 26, 1886, is declared null and void for all amounts over and above a dividend amounting to \$1,000 with interest from February 9, 1881, to be realized thereon; and is not to be enforced or considered binding against the estate of Ninian Irwin, deceased, after the dividend on said judgment shall pay plaintiffs the said sum of \$1,000 with interest as aforesaid.

IN EQUITY.

JAMES W. SHEPP AND DANIEL B. SHEPP VS. NORRISTOWN PASSENGER
RAILWAY COMPANY ET AL.

A street railway company is a private corporation, and under Article XVI, Section 7, of the Constitution of the state, the stockholders of the company can not increase the apital stock without giving sixty days notice of the meeting to be held for that purpose.

APPLICATION for a preliminary injunction. No. 5, March T., 1893.

Larzelere & Gibson, Esqs., for plaintiff.

Henry Freedley, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., April 13, 1893.

At a special meeting of the stockholders of the defendant company, held on the 5th day of April, 1893, it was resolved to increase the capital stock of the company from \$50,000 to \$75,000. At this meeting it was also resolved "that the motive power of the company's railway be changed from horse to electricity"; that the company's directors be authorized and empowered to enter into a contract with John A. Seeley & Co. to make the said change, paying therefor thirty thousand five hundred and fifty dollars in the capital stock of the company and the seventy-five thousand dollars of bonds authorized to be issued.

Upon the same day, but subsequent to this meeting, the directors of the company authorized and empowered the Vice President and Secretary of the company to execute a mortgage and to issue bonds to the amount of seventy-five thousand dollars; to execute a contract with the said John A. Seeley & Co., and to deliver to them the stock and bonds aforesaid for the construction and equipment of the railway.

The notice of special meeting of stockholders was first published on March 28, 1893—that is, but eight days before the time of the meeting. No other notice of the proposed increase of the capital stock was given.

Was the notice sufficient to sustain the action increasing the capital?

But fourteen of the forty or more stockholders were present at this meeting. These fourteen represented six hundred and thirty-

five of the eight hundred and eighty-nine shares of stock issued by the company.

Article XVI, Section 7, of the Constitution of the state provides: "The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, first obtained, at a meeting to be held after sixty days notice, given in pursuance of law."

The defendants contend that this provision of the Constitution applies to private corporations, and does not embrace street railways.

It is true the article speaks of private corporations; but the last section defines the meaning of the word "corporations" as used in the article. It "shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships."

But a railroad company is a private corporation. "Its officers are not public officers, and its business transactions are as private as those of a banking-house. Its road may be called a quasi public highway, but the company itself is a private corporation and nothing more. It is embraced by the provisions of the fourth section of Article 16 of the Constitution": *Pierce vs. Commonwealth*, 104 Penna. St. R., 155. If embraced in the provisions of the fourth section, it follows that it falls within the provision of the seventh section of the same article. See also *Morawetz on Private Corporations*, Vol. 1, Sec. 3; *Timlow vs. Philadelphia and Reading Railroad Co.*, 99 Penna. St. R., 284. That street railways are not embraced under Article XVII is shown in *Gyger vs. Railway Co.*, 26 W. N. C., 437.

The defendant company relies upon the act of May 14, 1889, under which it obtained its charter, and upon its own by-laws, which provide for a notice of one week by publication daily. The act of 1889 does not pretend to override the Constitution; and if it did it would be as ineffectual as the by-law of the company. The affidavits disclose the difficulties of the company and the need for an early change in the motive power to propel its cars, but we can not ignore the constitutional requirement of sixty days notice to stockholders before the company may increase its capital stock.

And now, April 13, 1893, a preliminary injunction is awarded restraining the defendant company or any of its officers from increas-

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ing the capital stock or issuing any shares of stock beyond one thousand [its original capital] by virtue of any resolution of stockholders passed on the 5th day of April, 1893, security to be entered in five thousand dollars.

IN EQUITY.

AMELIA EDELMAN, R. M. ROOT AND A. G. SAYLOR VS. S. B. LATSHAW AND NEW YORK AND MIDDLE COAL FIELD RAILROAD AND COAL COMPANY.

A court of equity only has jurisdiction in a proceeding for the cancellation of an executed contract for the sale of chattels where, from the nature of the subject, or the immediate object of the parties, no convenient measure of damages can be ascertained; or where nothing could answer the justice of the case but the performance of a contract in specie.

Where the party can be compensated in damages, and the stock and chattels sought to be recovered have no peculiar or special value, a court of equity will not decree their recovery, but will remit the party to his common law action for damages.

A mere misstatement by the buyer of his motive in purchasing, or in stating the value of the article purchased, is not within the class of cases in which equity will grant relief, if the vendor had opportunities for investigation as to the truth of the statements, and relied on his own judgment rather than on the representations of the vendee.

EXCEPTIONS to master's report. No. 2, December T., 1891.

Charles Hunsicker, Esq., for plaintiffs.

Neville D. Tyson, Esq., for Railroad and Coal Company.

Hallman & Place and *J. V. Gotwalts, Esqs.*, for S. B. Latshaw.

Opinion of the court by WEAND, J., April 13, 1893.

This bill is brought for the cancellation of an executed contract of sale of certain shares of stock bought by the plaintiffs at a public sale and afterwards sold to the defendant Latshaw. The allegation is that Latshaw induced plaintiffs to sell him the stocks by false representations as to their value and as to his object in buying. The stocks consisted of 750 shares of the New York and Middle Coal Field Railroad and Coal Company, 1,500 shares of the Arion Silver Mining Company, and 500 shares of the Montana Gold and Silver Mining Company, and had belonged to one Daniel Latshaw, deceased, the father of defendant, and were bought by plaintiffs at an executors' sale of decedent's effects, held March, 1887, for \$11.40.

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After the sale, defendant Latshaw, who was one of the executors, remarked to the purchaser that the stocks were of no value, and that he did not know where the offices of the companies were located. In September, 1891, one C. R. Lindsay, who previously had been connected as Secretary with the New York and Middle Coal Field Railroad and Coal Company, wrote to Daniel Latshaw, not knowing he was dead, inquiring whether he still held any stock in said company, and asking the lowest price he would take for it, stating also that the stock had no market value but that he could use it at two dollars per share. This letter was received and answered by defendant S. B. Latshaw, who then wrote to Saylor, one of the plaintiffs, asking whether he still held the stocks bought at the sale, and what he would take for them. A correspondence was then carried on between defendant and Saylor, in which Latshaw stated that he believed the stocks had no intrinsic value, and that he could find no offices of the company, and offering twenty-five dollars for the lot. The parties, plaintiff and defendant, afterward met at Pottstown, when the stocks mentioned were sold to Latshaw for fifty dollars. It is alleged by plaintiffs that at the time of transfer Latshaw was asked by Saylor, "What is there in this stock that you appear so anxious to have it? You laughed at me when I bought it," and that he replied, "I want it as a relic of my father's effects; it has no value, and no office or officers of the company," and that these representations were the inducement to sell them to him. At this time Latshaw had Lindsay's offer of two dollars per share for the 750 shares of railroad and coal company stock. The other stocks had no market value, nor does it appear that the companies are still in existence.

The plaintiffs could only find certificates for 600 shares of the railroad and coal company stock, but the assignment to Latshaw covered them all; but because of the missing certificates Latshaw could only realize on 600 shares of the railroad and coal company stock, for which he received \$1,200 from Lindsay. The bill prays for a reassignment of said shares and for an injunction to prevent further transfers.

The master dismissed the bill for want of jurisdiction, holding that there was a complete and adequate remedy at law. Exceptions were filed by plaintiffs.

In McGowin vs. Remington, 12 Penna. St. R., 56, Judge Bell, in

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speaking of cases for the recovery of chattels by a proceeding in equity, said: "The precise ground of this jurisdiction is said to be the same as that upon which the specific performance of an agreement is enforced, namely, that fruition of the thing, the subject of the agreement, is the object, the failure of which would be but illy supplied by an award of damages; and that chancery always interferes where, from the nature of the subject, or the immediate object of the parties, no convenient measure of damages can be ascertained, or where nothing could answer the justice of the case but the performance of a contract in specie."

There are exceptions to the well settled principle of law that equity will not enforce specific execution of contracts relating to chattels, as was ruled in Foll's Appeal, 91 Penna. St. R., 434; Goodwin Gas, Stove and Meter Co.'s Appeal, 117 Id., 514; and other cases. But we fail to find that plaintiffs have brought themselves within any of the excepted cases. To the plaintiffs these stocks have no special or peculiar value, and were not purchased for any special purpose. The only object of their purchase was to make money from them, and hence their only value to plaintiffs is what might be realized from a resale. When they bought, plaintiffs thought they were worthless, and did not even know that the companies had an existence; and, therefore, if there was nothing else in the case but a mere breach of contract, plaintiffs would have a complete and ample remedy at law for the loss sustained, if any.

This damage could be readily ascertained, as appears by the testimony in the case. It is no answer to say that the stocks other than the railroad and coal company stock have no market value, and that the damage on that account could not be ascertained, for it is apparent that as to them defendant made no fraudulent representation, for he knew nothing of their value; nor do the plaintiffs; and were it not for the railroad and coal company stock, this suit never would have been brought. In the language of the master: "The wrong, therefore, against which they complain is the acquirement of the coal stock from them for a nominal price. If they be paid the full value of the coal stock they will, under their own showing, be entirely compensated for all damages consequent upon any wrong of the defendant."

Can the bill be sustained upon the ground that the defendant Latshaw was a trustee *ex maleficio*, or upon the ground that he had practiced a fraud in procuring the stocks?

He occupied no fiduciary relation to the plaintiffs. What he said at the executors' sale had nothing to do with plaintiffs' purchase, and after that he was acting towards them as an individual, and their relations were simply that of vendor and vendee. He was not bound to disclose his knowledge of the value of the stocks, provided he did not make fraudulent representations or suppress the truth when it was his duty to speak. Plaintiffs had opportunities for informing themselves of the condition of the various companies, but they appeared to have taken but little interest in the matter. Was he guilty of such fraud as will entitle the plaintiffs to the relief asked for? It is true that a confidential relation is not necessary to establish a constructive trust, and that a trust may arise from actual fraud; but this fraud alone will not be sufficient to warrant relief, unless the parties relied upon the fraudulent representations which were the inducements to their contract.

In Adams Equity, 5 Am. Ed.,* p. 174, it is said: "The jurisdiction for rescission and cancellation arises where a transaction is vitiated by illegality or fraud, or by reason of its having been carried on in ignorance or mistake of facts material to its operation. And it is exercised * * * for setting aside executed conveyances or other impeachable transactions, where it is necessary to replace the parties in *statu quo*. And in such cases, though pecuniary damages might be in some sense a remedy, yet if fraud be complained of there is jurisdiction in chancery." The author instances amongst cases of this character the procuring contracts to be made or acts to be done by means of willful misrepresentation, either express or implied, etc. But to constitute a case of this kind there must be a representation, express or implied, within the knowledge of the party making it, reasonably relied on by the other party, and constituting a material inducement to his contract or act. Tested by this rule, have the plaintiffs a standing in a court of equity?

According to the evidence the coal company at all times had an office in Philadelphia, which was given in the city directory; and it further appears that some time after the purchase by plaintiffs, Mr. Edelman visited New York to inquire about the stocks, having with him one of the certificates for the coal company stock. It thus ap-

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pears that plaintiffs had means of information open to them, and that they investigated the matter. How can it be said, therefore, that they relied on Mr. Latshaw's representations as to value rather than on their own knowledge.

In *Clapham vs. Shillip*, 7 Beavan, 146, it was ruled that "cases have frequently occurred in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry and not upon the representations made to him by the other party."

In the case under consideration plaintiffs held the stocks for four years, had made investigation, and must have been convinced without any representations from Latshaw that the stocks were worthless.

It is also stated in *Adams Equity*, 356, that a mere misstatement by the buyer of his motive in purchasing or in limiting the amount of his offer, will not bring the case within the class of cases in which equity will grant relief. And for this he cites *Vernon vs. Keys*, 12 East, 616, where the vendee "falsely and deceitfully represented to the vendor that he was about to enter into partnership in the same trade with other persons whose names he would not disclose, and that these persons would not consent to his giving the plaintiff more for his interest than a certain sum; whereas, in truth, neither A and B, with whom he was then about to enter into partnership, nor any other intended partners of his, had refused to give more than that sum, but had then agreed with the defendant that he should make the best terms he could with the plaintiff, and would have given him a larger sum. And in fact the defendant charged them with a larger price in account for the purchase of plaintiff's interest." *Held*, that an action on the case did not lie for this false and deceitful representation by the bidder of the seller's probability of getting a better price for his property, for it was either a mere false representation or at most a *gratis dictum* of the bidder upon a matter which he was not under any legal obligation to the seller to disclose with accuracy, and on which it was the folly of the seller to rely.

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There is another reason which is fatal to plaintiffs' contention.

It is apparent that plaintiffs are seeking to recover damages for their loss, and not to recover the specific chattels sold. It is not alleged nor shown that the stocks have to them any especial value apart from their money value, and plaintiffs will be placed in *statu quo* when they are paid what they have lost in money. In *Mackintosh vs. Tracy*, 4 Brews., 59, it was held that "in cases of fraud, especially where the fraud relates to sales of personal chattels, and where the relief sought is merely compensation in damages, if the remedy at law is adequate relief is not ordinarily granted in equity." See also *Parsons on Contracts*, Vol. 2, p. 782.

We are of opinion that the master did not err in dismissing the bill.

And now, April 13, 1893, the exceptions are overruled and the report of the master is confirmed at the costs of the complainants.

JOHN C. LEWIS VS. COUNTY OF MONTGOMERY.

Borough and township auditors are not entitled to compensation from the county for their personal services incident to the duties imposed upon them by the Baker ballot law of June 19, 1891.

The only expenses allowed by the first and thirteenth sections of said act are the "cost of printing and distribution" of the ballots and election papers, including any expense necessarily incurred in connection therewith.

CASE stated. No. 96, June T., 1893.

Holland & Dettra, Esqs., for plaintiff.

Henry R. Brown, Esq., for defendant.

Opinion of the court by WEAND, J., May 15, 1893.

The plaintiff is an auditor of the borough of Conshohocken, and, as such officer, seeks to recover from the county of Montgomery twenty dollars, "as compensation for the time spent, the labor bestowed, and the money expended by him in the performance of the service" incident to the attending to the printing of ballots used at the borough election held February, 1893, in distributing said ballots and sundry election papers received from the commissioners of said county to the judges of election in the four election districts of said borough, and expenses therein incurred.

Public officers accept their positions *cum onere*, and they are often required to perform public duties for which no compensation is allowed. He who seeks to recover pay for the performance of a public duty must show some authority of law for such payment. It is conceded that unless the claim can be allowed under the first and thirteenth sections of the Baker ballot law of June 19, 1891, P. L. 349, it must be rejected. Under that act the ballots "for the election of officers of townships and boroughs, and election officers and school directors in the same, shall be printed and distributed by the auditors, who shall certify the cost of such printing and distribution to the county commissioners for payment as part of the county election expenses." We think there can be but one reasonable construction to be placed upon this language, and that it excludes any idea of compensation to the auditor for his personal services. "The cost of printing and distribution" is what he must necessarily pay to have such printing done and distributed, and any expense necessa-

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rily incurred in connection therewith, such as cartage, expressage, postage, and necessary traveling expenses. In this case the auditor could not possibly have been occupied more than one day in distributing the ballots and papers, and yet he charges twelve dollars for himself and three dollars expense for such service. Without reference to the amount of his claim, we are of opinion that under the case stated he is only entitled to the amount expended, three dollars, and nothing for his services in superintending the printing or distribution of the tickets.

And now, May 15, 1893, judgment is rendered in favor of plaintiff and against defendant for three dollars, with costs of suit.

IN EQUITY.TOWNSHIP OF LOWER POTTS GROVE VS. THE POTTS TOWN PASSENGER
RAILWAY CO.

The written consent of both supervisors to the use of a public road by a passenger railway company is good and valid in law, although they did not meet together and deliberate upon the question.

Having given such written consent, they can not afterward repudiate their act upon the ground that they did not meet and deliberate after the company has incurred expense.

MOTION for preliminary injunction. No. 4, March T., 1893.

Childs & Evans, Esqs., for plaintiff.

Henry D. Saylor, Esq., for defendant.

Opinion of the court by WEAND, J., April 13, 1893.

The plaintiffs ask for a preliminary injunction to restrain defendants from constructing their street railway on a public road in Pottsgrove township.

The material allegation upon which plaintiffs base their right to an injunction is that the consent of the corporate authorities has not been obtained. Upon hearing, however, this consent in writing, signed by both supervisors, was exhibited. Defendants' affidavits

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also deny every material allegation in plaintiffs' bill. It is now urged that this consent is illegal because obtained from each supervisor separately and not at or in consequence of a meeting held by them after deliberation. We are not convinced that this is necessary where there are but two to act. Notice must be given to all who are authorized to do an act of a public nature, judicial in its character, requiring deliberation, and the reason is founded on motives of public policy: *Rittenhouse's Estate*, 140 Penna. St. R., 172; *Somerset Township vs. Parson*, 106 Id., 360.

But supervisors have no public office such as county commissioners, and their proceedings are not recorded with the same particularity as a town council or county commissioners meeting. As both must agree in the performance of the duty, there is no danger that the rights of the minority will be interfered with; and when both sign an agreement, as in this case, it will be assumed that it was the result of deliberation. The reason of the rule ceases when those who are to act do so unanimously; for if they did meet they could not do more than they have done, and signing in each other's presence would therefore be no more deliberative than to do so separately. We think, further, that they are estopped from setting up this claim. They have by their conduct induced defendants to proceed in their work, and can not set up their own misconduct to the prejudice of defendants' rights. At least the right to relief at this stage of the case is so doubtful that we must refuse the injunction.

And now, April 13, 1893, the motion for a preliminary injunction is overruled.

H. E. ELSTON vs. W. U. JURY ET AL.

A portable heater is not the subject of a mechanics' lien, under the act of 1836; nor is it covered by the act of 18th May, 1887, P. L. 118, where it is merely put into an old house to replace an old heater. Under the act of 1887 there must be some alteration, addition or repair which to some extent changes the character of the building, and whereby the work done or materials furnished are rendered necessary.

MOTION to take off non-suit. No. 11, October T., 1892.

Freas Styer, Esq., for plaintiff.

Holland & Dettra, Esqs., for defendants.

Opinion of the court by WEAND, J., May 15, 1893.

The heater for which this lien was filed is a portable one, and in no way connected with the building except by tin flues or pipes. It is no more a permanent fixture than an ordinary stove would be, and hence not the subject of a lien: *Harrison vs. Homœopathic Association*, 134 Penna. St. R., 558. The plaintiff in his testimony states that it was put in to replace an old one, and therefore it was not done in or about the erection or construction of the building, and can not be sustained under the act of 1836. It is claimed, however, that it is covered by the act of 18th May, 1887, P. L. 118, giving a lien for alterations, additions and repairs. If a lien under this act can be maintained for a heater of this kind, why not for a new lock, paper on the walls, etc., in an old building? We think the act contemplated something more than this, and that a mechanic or material man is not entitled to a lien under it unless there be some alteration, addition or repair which to some extent changes the character of the building, and whereby the work done or materials furnished have been rendered necessary: *Haslett vs. Gillespie et al.*, 95 Penna. St. R., 371.

If we examine the lien we find that it is filed as a "claim made for furnace or heater, the necessary furnishing and fittings therefor, and for work and labor done in and about the construction and erection of said furnace or heater and furnishing or building and on the credit thereof." The lien, therefore, does not aver that the work was done in the original erection or construction of the building, or as alterations, additions and repairs, which would seem to be necessary under the ruling in *Morrison vs. Henderson*, 126 Penna. St. R., 216.

And now, May 15, 1893, the motion to take off the non-suit is overruled.

ANNA M. NEAL, WIFE OF WILLIAM NEAL, ONE OF THE DEFENDANTS
BELOW, PLAINTIFF IN ERROR, VS. WILLIAM DUNCAN AND JAMES
MURPHY, TRADING AS DUNCAN & MURPHY, DEFENDANTS IN
ERROR.

Where a defendant fails to appear, judgment can not be entered against him by the justice unless there is due proof under oath or affirmation of the service of the summons.

Where the justice has no jurisdiction, the twenty days limit for a certiorari does not apply; but the application for the writ should be made within twenty days from the time the defendant learns of the entry of the judgment.

CERTIORARI to justice of the peace. No. 156, June T., 1892.

Henry M. Brownback, Esq., for plaintiff.

Wanger & Knipe, Esqs., for defendants.

Opinion of the court by SWARTZ, P. J., May 15, 1893.

This record is defective. It does not clearly appear that there was any service upon the wife, who was sued jointly with her husband. The language of the transcript indicates service upon the husband alone. But if the return of the constable is broad enough to embrace a service upon the wife, it is nevertheless insufficient because there is no oath of service. There was no appearance of the wife. It is true the justice states "William Neal (the husband) represents the defendants," but an appearance of the husband is not of itself an appearance for the wife. He was a defendant, and represented himself.

Where a defendant fails to appear, judgment can not be entered against him unless there is due proof by oath or affirmation of the service of the summons: Act of March 20, 1810, Sec. 6; *Benedict vs. Hicock*, 1 *Pearson*, 133.

The certiorari was not taken out within twenty days. Where the justice has no jurisdiction the twenty days limit does not apply. The application for the writ should, however, be made within twenty days from the time the defendant learns of the entry of judgment.

The appellant swears she had no knowledge of the judgment prior to May 1, 1892. She applied for the writ on May 16, 1892.

Even if she is mistaken as to the time, it is questionable whether a married woman under such circumstances is estopped by her acts or laches: *Krause vs. Leiby*, 1 *Leg. R.*, 74.

Reifsnyder vs. Missimer et al.

Acts and declarations which estop in the case of a femme sole may not operate as an estoppel in the case of a married woman: *Stivers vs. Tucker*, 126 Penna. St. R., 74.

And now, May 15, 1893, the judgment against Anna M. Neal is reversed and the proceedings as to her are set aside.

GEORGE A. REIFSNYDER VS. SAMUEL MISSIMER AND SUSAN MISSIMER,
HIS WIFE.

Upon a scire facias to revive a judgment an affidavit of defence is not sufficient if it fails to deny the existence of the original judgment or fails to show a subsequent satisfaction in whole or in part.

In a suit against a married woman before a justice of the peace it is no longer necessary to set out in the record of the proceedings the facts which before the act of June 3, 1887, P. L. 332, were necessary to give the judgment validity.

MOTION to strike off judgment as to Susan Missimer.

MOTION for judgment on sci. fa. to revive judgment for want of a sufficient affidavit of defence. No. 121, March T., 1893.

Henry M. Brownback, Esq., for plaintiff.

John W. Bickel, Esq., for defendants.

Opinion of the court by SWARTZ, P. J., May 15, 1893.

Suit was brought before a justice of the peace, and the judgment was entered against the defendants February 29, 1888. A transcript was entered in the Court of Common Pleas for the purposes of lien. The plaintiff on March 2, 1893, caused a writ of scire facias to be issued to revive the judgment entered in the Common Pleas. The defendant Samuel Missimer filed an affidavit of defence, and the defendant Susan Missimer asks that the judgment may be stricken off as to her.

The affidavit of defence is not sufficient. It does not deny the existence of the original judgment as to the husband, or offer to show a subsequent satisfaction in whole or in part: *Dowling vs. McGregor*, 91 Penna. St. R., 412. The defendant proposes to attack the merits of the original judgment. This he can not do in the present proceeding.

Reifsnyder vs. Missimer et al.

Can we strike off the judgment as to the wife?

If the judgment had been entered prior to the act of June 3, 1887, P. L. 332, it would be stricken off. Under the act of April 11, 1848, it was not self-supporting, for the record under the latter act must show a debt contracted by the wife and incurred for articles necessary for the support of the family of the husband and wife: *McKinney vs. Brown*, 130 Penna. St. R., 365. The transcript before us states that the debt is "a book account for groceries sold and delivered to the defendants."

"The rights and liabilities of married women in Pennsylvania have been greatly and radically changed and enlarged by the act of 1887. The authorities which were applicable to questions arising before the passage of that act are entirely inapplicable now. The judgment against a married woman which was then presumably void is now presumably valid. It is no longer necessary to such validity to set out in the record the facts which before the act were necessary to give the judgment validity": *Abell vs. Chaffee*, 26 Atlantic, 364; *Koechling vs. Henkel*, 144 Penna. St. R., 215; *Milligan vs. Phipps*, 25 Atlantic, 1121.

It follows that unless the statement of the justice in his transcript negatives the liability of the wife, the judgment must stand. The husband is joined with the wife in the suit; but this does not show the non-liability of the wife. If the groceries were necessities purchased by the wife for the family upon her credit or the credit of her separate estate, still the husband is primarily liable for the goods. The wife may have contracted the debt and made her estate liable, and yet the statement of the record may be true that "the debt is for groceries sold and delivered to the defendants." The justice is not required to set out in the record the evidence upon which he based the judgment. The evidence that he took, under the oath of the witness, may have established the wife's liability. We do not find anything in the record inconsistent with the theory that such evidence was offered. Every fair presumption will be made in favor of the regularity of the proceedings before the justice.

Where evidence is heard but not returned by the justice, the presumption is that it was of such a character as to sustain the judgment entered upon it. We conclude that the judgment is not void, and therefore we can not strike it off. The court has no power to

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open or set aside the judgment, because the Common Pleas can only acquire jurisdiction over it upon appeal or certiorari.

And now, May 15, 1893, the motion to strike off the judgment is refused, and judgment is directed to be entered in favor of plaintiff and against defendants for want of a sufficient affidavit of defence.

MICHAEL F. MACK VS. CONRAD A. MILLER, AGENT.

A proceeding will be set aside upon certiorari where there is no appearance by the defendant and the writ issued by the justice fails to state where his office can be found.

A proceeding under the act of April 9, 1760, provides for a conviction, and the summons should issue in the name of the commonwealth and follow the information.

The justice has no authority to diminish or increase the forfeiture prescribed by the act, in case of conviction.

EXCEPTIONS to the proceedings before the justice. No. 38, March T., 1893.

H. U. Brunner, Esq., for plaintiff.

Wm. F. Dannehower, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., May 15, 1893.

Michael F. Mack was convicted before a justice of the peace on a charge of hunting on the lands of others without a license. The proceeding was instituted under the act of April 9, 1760.

The justice issued a summons in the name of Conrad A. Miller, agent for Sarah Miller, commanding the defendant to answer in a plea of debt for a penalty not exceeding three hundred dollars.

The defendant is a resident of Norristown. The summons was placed in the hands of the constable of Upper Hanover township, where the alleged hunting took place. The defendant did not appear. The justice attested the summons at Marlborough. William H. Buck is a justice of the peace of the township of Marlborough. The record does not disclose the place of hearing. If it took place at some point in Marlborough township, the summons fails to inform the defendant where he is to appear. He may be presumed to have some knowledge of Upper Hanover township where he engaged

Mack vs. Miller, Agent.

in hunting, but we can not assume that he was acquainted with this justice or the place of his office in Marlborough township. A letter addressed "at Marlborough" indicates a town or post-office by that name; it is misleading, for there is no such town or post-office in the county. A writ issued by a justice must state where the office can be found: Murdy vs. McCutcheon, 95 Penna. St. R., 435. This omission in the record before us is fatal to the proceedings. The exceptions attack the regularity of the hearing and cover the defect just considered.

There are other irregularities, but it is not necessary to decide whether these of themselves are sufficient to set aside these proceedings.

The act provides for a conviction, and the summons should have issued in the name of the commonwealth: Van Swartow vs. Commonwealth, 24 Penna. St. R., 131; Commonwealth vs. Borden, 61 Id., 272.

The summons should have followed the information, instead of stating that the defendant was to answer "in a plea of debt for a penalty not exceeding three hundred dollars." The summons gave the defendant no intimation of the nature of the charge against him, but, on the contrary, was calculated to mislead him. This is a matter of importance when the proceeding is by summary conviction.

The judgment of the justice is for a forfeiture of five dollars. The act declares the forfeiture to be forty shillings, or five dollars and thirty-three and one-third cents. The justice has no discretion to diminish or increase the forfeiture prescribed by the act in case of conviction.

And now, May 15, 1893, the proceedings before the justice are set aside.

THE BURGESS AND TOWN COUNCIL OF THE BOROUGH OF NORRISTOWN
VS. LEVI R. SHAFFER.

General acts without negative words do not repeal local acts passed for the benefit of a municipality. The Legislature in framing a general system for the state does not intend to repeal a special act which the local circumstances made necessary.

The general act of April 13, 1876, P. L. 27, giving borough councils the right to fix the salary of a burgess, does not repeal the local act of April 2, 1831, P. L. 389, which fixes the fees of the Burgess of Norristown.

CASE stated. No. 116, June T., 1893.

W. S. Fennings, Esq., for plaintiff.

Larzelere & Gibson, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., June 5, 1893.

The borough of Norristown was incorporated by a special act of the General Assembly approved March 31, 1812, P. L. 255. By a supplement to this act, approved April 2, 1831, P. L. 389, the rights and duties of the Burgess were defined. The eighth section of the supplement provides: "That the burgess for the time being shall take cognizance and have all the power, jurisdiction and authority of justices of the peace within the said borough for the suppression of riots, tumults and disorderly meetings, for the punishment of vagrants and disorderly persons, as well as in all other criminal cases, and in all cases of violations of the provisions of the act to which this is a supplement, and the provisions of the several supplements thereto, or of the ordinances of the said borough which have been heretofore made and may hereafter be enacted; and shall be entitled to the same fees for like services as justices of the peace are by law entitled to receive."

A general act of the Legislature, approved April 13, 1876, P. L. 27, declares that "the councils of each borough in this commonwealth are hereby empowered, from time to time, to prescribe by ordinance the salary to be paid out of the borough treasury to the burgess of such boroughs respectively, in lieu of all fees, fines and costs, and the manner in which such salary shall be paid."

The Town Council of the borough of Norristown, being of the opinion that the act of 1876 was applicable to the office of Burgess in said borough, fixed by ordinance the salary of the Burgess at "seven hundred dollars, in lieu of all fees, fines and costs which may be paid to or be payable to or be received by or be receivable by him by virtue of his office."

Burgess, &c., of Norristown vs. Shaffer.

The defendant, Levi R. Shaffer, was elected to the office of Burgess subsequent to the passage of said ordinance. He declines to pay over the fees, fines and costs received by him in lieu of the salary, and gives as his reason for the action the illegality of the ordinance.

Can the Town Council take away the fees secured by the special act of 1831 by virtue of the general act of 1876? Does the general act repeal the special act?

The rights and duties of a burgess are fixed by the general borough act of 1851, P. L. 320. Under it the burgess is "to exercise the powers, jurisdiction and authority of justices of the peace within the borough for the suppression of riots, tumults, disorderly meetings; and in all criminal cases for the punishment of vagrants and disorderly persons he shall be entitled to the same fees for like services."

It will be noticed that the Burgess of Norristown has powers far in excess of those given to the burgess under the act of 1851. Under the latter act the burgess has no general jurisdiction in criminal cases; he does not have the rights of a justice of the peace except in the five classes of offences named: *Com. vs. Thompson*, 1 Cent. R., 393. The Burgess of Norristown, on the contrary, has all the powers of a justice of the peace in criminal cases. The Burgess of Norristown has jurisdiction in cases of the violations of the acts of 1812 and 1831, as well as the violations of the ordinances of the borough. The burgess under the act of 1851 had no such extensive jurisdiction; he had no authority to hear proceedings for the recovery of fines and penalties imposed for violations of borough ordinances: *Com. vs. Thompson*, *supra*; *Schlager vs. Borough of Nanticoke*, 4 Kulp, 244. The Burgess of Norristown is a justice of the peace of the borough in all criminal proceedings; the burgess under the act of 1851 is the executive officer to suppress disorder and to punish vagrants and disorderly persons. These powers were not extended until the act of May 19, 1887, was passed. Even under the latter act he is not vested with general criminal jurisdiction.

In determining the effect of the act of 1876 upon the special law of 1831, we must consider the laws as they stood upon the statute books prior to the passage of the act of 1876. The difference in the rights and duties of the Burgess of Norristown, and the rights and powers vesting in a burgess under the act of 1851, we deem of importance in the determination of the question before us.

Burgess, &c., of Norristown vs. Shaffer.

A general statute without negative words will not repeal a previous statute which is particular, though the provisions in the two be different: *Brown vs. Commissioners*, 21 Penna. St. R., 37. General acts are ordinarily held not to repeal special acts passed for the benefit of a municipality: *Endlich on Interpretation of Statutes*, Sec. 228. "Rarely if ever does a case arise where it can justly be held that a general statute repeals a local statute by mere implication": *Malloy vs. Reinhard*, 115 Penna. St. R., 25. Such repeals are not favored and are not allowed except in cases of strong repugnancy or irreconcilable inconsistency: *Harrisburg vs. Sheck*, 104 Penna. St. R., 57. The reason for the rule is found in the fact that "a local statute enacted for a particular municipality, for reasons satisfactory to the Legislature, is intended to be exceptional and for the benefit of such municipality. It has been said that it is against reason to suppose that the Legislature in framing a general system for the state intended to repeal a special act which the local circumstances made necessary": *Malloy vs. Reinhard*, *supra*.

If the Legislature found it necessary to give to the Burgess of Norristown a position differing from that held by the burgesses throughout the commonwealth, what is there in the act of 1876 indicating that the necessity for the distinction no longer existed in the minds of the legislators? Naturally the word "burgess" used in the act of 1876 relates to that office defined under the act of 1851, and there is nothing to indicate an intention to apply it to an officer having widely different functions. The act when confined to the burgess created under the borough act of 1851, may be wise legislation; but applied to an officer having other rights and powers, may be unwise. If the Burgess of Norristown is to pay over fees and receive a salary, why not include justices of the peace and compel them to pay over fees and receive a salary, for, as we have shown, the powers of the Burgess in the borough of Norristown are co-extensive with those of a justice of the peace in criminal matters?

As there is no repealing clause, no intimation of any kind that special acts are embraced under the act of 1876, it follows that the act of 1831 still stands, and the fees of the Burgess of Norristown can not be taken away from him by a borough ordinance.

We can not distinguish this case from that of *Morrison vs. Fayette County*, 127 Penna. St. R., 110, where it was held that an act fixing the fees of the auditors of each county did not repeal the local

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law in force in Fayette county fixing such auditors' fees at a different figure. Nor does it differ in principle from the case of *Malloy vs. Reinhard*, 115 Penna. St. R., 29, where a local act authorizing the borough council to elect a tax collector was not repealed by the general act of June 25, 1885, P. L. 187, providing for an election of a tax collector by the qualified voters of each borough and township. It is true the general act had a repealing clause excepting local acts, but the court held that even without the repealing section the local statute would not have been affected.

It is argued that the two methods of compensation are inconsistent, and can not both stand. But this inconsistency is likely to continue, even if our particular statute is repealed. The act of 1876 does not make it obligatory for each borough council to fix the salary of the burgess. They are empowered to pass ordinances to that effect; they may or may not see fit to exercise the power. It follows that in some boroughs created under the act of 1851 the burgess may still receive fees, while in others he is limited to his salary. Even if the act made the change obligatory, an inconsistency of this character would not repeal the particular statute: *Seifried vs. Commonwealth*, 101 Penna. St. R., 200; *Safe Deposit Co. vs. Fricke*, 31 W. N. C., 324.

It is not likely that the Legislature had in mind the powers of the Burgess of Norristown given to him by special statute, and we will not assume that it intended to take away from him certain rights without some intimation in the act indicating such intent.

And now, June 5, 1893, judgment is entered for the defendant upon the case stated with costs.

COMMONWEALTH EX REL. THE MONTGOMERY COUNTY PASSENGER
RAILWAY COMPANY; AND JOHN H. CLARK ET AL., CONSTITUTING
A MAJORITY OF THE MEMBERS OF THE TOWN COUNCIL OF THE
BOROUGH OF CONSHOHOCKEN, VS. GEORGE N. HIGHLEY, BURGESS
OF THE BOROUGH OF CONSHOHOCKEN.

Where the charter of a borough requires the Burgess to sign all ordinances after they shall have been correctly transcribed by the clerk and presented to him for his signature, his duties are purely ministerial; and upon his refusal to sign, the court will compel him to do so by mandamus.

The answer of the Burgess set forth, *inter alia*, that one of the Councilmen was interested in the railway company in whose favor the ordinance was passed and that the company had already violated a condition of the ordinance. *Held*, that these matters could not be set up by the Burgess as a reason for not signing the ordinance.

PETITION for mandamus. No. 75, June T., 1893.

Holland & Dettra, Esqs., for plaintiffs.

Larzelere & Gibson, Esqs., for defendant.

Opinion of the court by WEAND, J., May 27, 1893.

This case comes before us on a demurrer to the answer of defendant.

We are of opinion that as the Burgess of Conshohocken is required as a purely ministerial act to sign the ordinances passed by the Council of said borough, the facts set forth in his answer will not justify him in withholding his signature from the ordinance in question. If the ordinance was illegally passed or has become void by reason of anything done by the persons therein referred to, the question can and must be raised in another proceeding; but the Burgess as such is not made a judicial officer to pass upon the legality of the act. The opinion of Judge Boyer in *Com. vs. Bullock*, 2 Montg. L. R., 5, fully covers the law of the case.

And now, May 27, 1893, after hearing, judgment is entered in favor of plaintiffs and against defendant on the demurrer, and a peremptory mandamus is awarded requiring George N. Highley, Burgess of the borough of Conshohocken, within five days from the service of this order to affix his signature as Burgess to an ordinance passed by the Council of said borough on the 15th day of March, A. D. 1893, entitled "An ordinance by the local authorities of the borough of Conshohocken, permitting the Montgomery County Passenger Railway Company to operate its road by electricity, and to use electric motors to be supplied either by overhead wires or with such

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other electrical equipments as said railway company shall deem expedient, and to erect and to maintain poles to support said wires within the limits of the said borough on the streets hereinafter named"; and that said George N. Hingley pay the costs of this proceeding.

IN EQUITY.

NORRISTOWN JUNCTION RAILROAD COMPANY, PHILADELPHIA AND READING RAILROAD COMPANY, LESSEE OF SAME, AND THE RECEIVERS OF SAID PHILADELPHIA AND READING RAILROAD COMPANY, VS. THE CITIZENS PASSENGER RAILWAY COMPANY OF NORRISTOWN.

The office of a preliminary injunction is to prevent injury rather than to remedy an injury already done. It will not be awarded where the equity of the complainant is questioned on every ground upon which he puts it.

The act of June 19, 1871, P. L. 1360, relating to grade crossings, has no application to a crossing established and in actual use; it applies to the case of a new road which *intends* to cross an existing road. At least, such established crossing will not be disturbed by a preliminary injunction.

APPLICATION for a preliminary injunction. No. 11, March T., 1893.

James Boyd and C. Henry Stinson, Esqs., for plaintiffs.

Joseph Fornance and Henry Freedley, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., June 3, 1893.

The plaintiffs' railroad crosses Main street, in the borough of Norristown. Its depot is located on the north side of the street, at the crossing:

The defendant's passenger railway operates its street cars on said Main street, and crosses the tracks of the plaintiff company at grade. This grade crossing was constructed in 1887, and has been in use continuously to the present day. The street cars are propelled by horse power.

By letters patent, issued the 14th day of November, 1892, the defendant company secured all the powers, privileges, franchises and immunities conferred by the act of Assembly approved May 14, 1889, P. L. 211. The company now proposes to operate the road by the

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use of an overhead electric trolley wire. The necessary changes are being made to propel the cars by electricity as the motive power.

We are asked to enjoin the company from running its electric cars at grade over the plaintiffs' railroad tracks, and to compel the use of certain appliances and safeguards at the crossing, in order that the danger from accident may be reduced to a minimum and the interference with the plaintiffs' road be limited to the actual necessities of the case.

Under the first branch of the application we are asked to abolish by preliminary injunction an existing grade crossing. Penna. R. R. Co. vs. Braddock Electric R. R. Co., 31 W. N. C., 311, is cited as the authority for such action; but in the case cited the court was called upon to enjoin the electric road from *establishing* a new grade crossing. This is a different proposition from that presented to us. In the case before us the necessity for a grade crossing is already adjudicated. It has been in continuous use for nearly six years, and the plaintiff company took part in establishing it by doing the necessary work at the crossing to provide a passage-way for the cars of the defendant. True, the cost of the work was paid by the defendant, but the crossing was established with the knowledge and assent of the plaintiff company.

The second section of the act of June 19, 1871, P. L. 1360, has no application to the case before us. Under that act the court shall define by decree "the mode of such crossing which will inflict the least practical injury upon the rights of the company owning the road which is intended to be crossed." The act applies where a new line proposes to cross an existing road—that is, there must be an "intended" crossing of the existing road. There is no provision for an interference where the parties have established the crossing and used it. At least, such interference by preliminary injunction can not be invoked by the party who helped to establish the crossing.

Again, the office of an injunction is to prevent injury rather than to remedy the injury already done. It is not the office of an injunction to pull down and destroy, but to prevent wrongs. If the grade crossing is to be abolished it can only be done after a full hearing and upon final decree.

The plaintiff, recognizing the difficulty, contends that the change of motive power constitutes this a new crossing for all intents and purposes. We can not assent to this proposition. The corporation

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is the same company to-day as that originally chartered. It is still nothing more than a street railway company. It may or may not use electricity. It is argued that the use of electricity is attended with greater danger at the grade crossing. If we concede this proposition, we do not see how upon a preliminary hearing the grade crossing can be abolished. Increased danger can not invoke the act of 1871. If the plaintiff increases the number of its trains at the crossing, the danger is increased even with the continued use of horse power by the defendant company. But the claim of increased danger from electric cars at the crossing is denied by the affidavits of the defendant. It is contended that the cars are fully as much under control by the new method as by the one now in use. Where the plaintiffs' right to interference is questioned on every ground upon which he puts it, the court will not award a preliminary injunction but determine the matter upon final hearing.

The crossing is so near the station at Main street that the engines on the plaintiffs' road necessarily approach the grade crossing with little speed and under full control, and this fact greatly diminishes the dangers of a collision. The construction of a bridge or trestle-work for an overhead crossing is not only expensive but a necessary interference with the free use of the principal highway of the borough, and attended with injury to the owners of the property abutting on the street. This is a matter of too much importance for disposition on a preliminary hearing.

It may be answered that a preliminary injunction will not compel the defendant company to build the bridge, but will stop further work until final hearing. We think the delay would be unjust to the defendant. If the bridge must be built, it can be done after final hearing just as well as now. The plaintiff loses nothing by the delay; the final decree will give it every protection due under the law. In a doubtful case the plaintiff is not entitled to an injunction. There is a strong public demand for electric railways throughout the commonwealth, and the court should not interfere with this demand unless the necessity is apparent in the case presented for adjudication.

The second branch of the plaintiffs' bill raises the question as to the proper methods and appliances to be used by an electric road in crossing railroad tracks at grade.

Elston vs. Richardson et al.

The plaintiff suggests certain devices, appliances and safeguards to be adopted by the defendant company. Whether these are the best known devices in use, approved by experience and by men having knowledge upon the subject, we are unable to state with the light we have upon the subject at this time. The time given for the preparation of the case did not enable counsel to secure the evidence of witnesses who might give us further aid in this important matter. The diligence of counsel for plaintiff is remarkable considering the short time allowed for the work. Further time, no doubt, will help the respective parties to present such evidence as will enable a master or the court to formulate a final decree that will secure public safety and the protection of the plaintiffs' property. We are sure that any attempt at this time to frame a decree to meet the requirements would be futile.

If the defendant should fail to provide proper headway between the railroad tracks and the trolley wire, or should fail to adopt such appliances and devices in common use best calculated to secure safety to life and property, we shall not hesitate to enter a decree restraining the operation of the electric cars until such appliances and devices are provided guarding the crossing from dangers as far as practicable.

And now, June 3, 1893, the application for a preliminary injunction is refused.

HARRY E. ELSTON VS. B. F. RICHARDSON, OWNER OR REPUTED OWNER, AND B. F. RICHARDSON AND W. U. JURY, CONTRACTORS.

By an agreement entered into between A, B and C, A agreed to purchase one of a number of houses which B was then building, C being the contractor under an agreement by which no liens could be filed.

As part of the purchase money A, a hardware dealer, was to give C an order for hardware, which C accepted as payment on account by B. Part of the materials thus obtained were used in the house bought by A. On the completion of the building B was unable to make title, whereupon A filed a lien for the materials furnished and used in the house. On the trial the court directed a verdict for defendant.

If the materials were furnished to the owner as part purchase money, they were not furnished on the credit of the building; and if furnished to the contractor, no lien could be filed under the agreement.

MOTION for a new trial. No. 62, October T., 1892.

Henry Freedley, Jr., and Freas Styer, Esqs., for plaintiff.

Larzelere & Gibson, Esqs., for defendants.

Elston vs. Richardson et al.

Opinion of the court by WEAND, J., June 5, 1893.

On the 15th day of May, 1891, the defendant contracted with W. U. Jury for the building of several houses on Airy street, Norristown, and in the agreement it was provided *inter alia* as follows: "And it is hereby agreed and expressly understood that the said Jury shall not have the right to file any mechanics' lien against the premises, any law or custom to the contrary notwithstanding; and that he will surrender the said building to the said Richardson on or before the first day of October, 1891, free of all liens and incumbrances or any claims whatever that might arise under any action of the said Jury under this contract. And it is understood and agreed that the clause forbidding the filing of any mechanics' liens by the said Jury shall be a prohibition against any such liens being filed by any subcontractor or material man or laborer under him."

On the 29th day of May, 1891, Richardson, Jury, and Elston the plaintiff, entered into an agreement referring to the first recited agreement of May 15th, by which defendant agreed to sell to plaintiff one of the houses which Jury contracted to build, for the price of \$2,900, payment to be made as follows: Elston to execute a first mortgage for \$1,500, payable in three years, and a second mortgage for \$400, payable in one year; and "for the balance he will give to the said Jury an order for goods sold in the hardware store of the said Elston in Norristown or materials dealt in by him, to the amount of one thousand dollars, at a price not greater than his current market price therefor to builders. And the said W. U. Jury hereby agrees to accept the said order on the said Elston as full payment for the sum of one thousand dollars by Richardson to Jury upon the contract price for the erection of the said two houses; this agreement not to alter the said original contract in any of its terms, except so far as this payment is a payment on account of the contract price, and not to alter any right or form of action thereunder."

After this contract was executed in triplicate the plaintiff furnished materials under the agreement, and testified, "these things are a part of the thousand dollars that I furnished Richardson."

On the completion of the building the plaintiff filed a mechanics' lien for the amount of his bill, and as a reason therefor alleged that Richardson had failed to comply with his contract of sale.

Under these facts we directed a verdict for defendant, as the question resolved itself into one of law and not of fact.

If the materials were furnished to Jury, the contractor, the plaintiff could not file a lien, for he had notice of Jury's agreement in which it was distinctly provided that neither the contractor nor any subcontractor could do so. The agreement is clear and precise on that point, and in the agreement of May 29th—the one of May 15th—in which the provision against liens occurs is referred to, with the agreement that the original is not to be altered in any of its terms as to any right or form of action.

The plaintiff, recognizing the force of this position, claims that he furnished the materials to Richardson under the agreement of sale. And in our opinion this precludes him from claiming under the mechanics' lien law, for the articles were not furnished on the credit of the building but, as testified to by the plaintiff, as part payment on account of the purchase money. Richardson the owner; Jury the contractor, and Elston the purchaser, all agreed to this, and the plaintiff is in no better position than he would be if he had paid one thousand dollars in cash on account of his purchase money. Instead of paying money he paid a certain amount in goods, and whether the articles were charged to Richardson or Jury can make no difference. Jury having accepted the order, was paid that much by Richardson; and if the latter used the goods in his own house, he might be liable to Jury for the amount; and if plaintiff has a remedy, it is against Richardson for not complying with his contract of sale. Having delivered the material as part payment for the house, as he agreed to do, he can not change his position and claim that he furnished them on the credit of the building.

And now, June 5, 1893, the motion for a new trial is overruled.

THOMAS S. PHIPPS VS. WALTER RAPINE.

Where, on an application to open a judgment on the ground that there is nothing due thereon, there is oath against oath, and that of the defendant as to payment is vague and indefinite, the court will decline to interfere.

MOTION to open judgment. No. 303, December T., 1892.

Freas Styer, Esq., for plaintiff.

H. B. Dickinson, Esq., for defendant.

Opinion of the court by WEAND, J., May 15, 1893.

"An application to open a judgment, entered upon a warrant of attorney or judgment note, is an equitable proceeding addressed to the discretion of the court, and is to be disposed of in accordance with the principles of equity": *Jenkintown National Bank*, 124 Penna. St. R., 337; *Faber vs. Carlisle Mfg. Co.*, 126 Id., 385.

The depositions taken in this case in our opinion do not justify us in granting the relief prayed for, and would not be sufficient to warrant a finding by a jury in favor of defendant. There is oath against oath; and that of defendant as to payment or settlement is too vague and indefinite to overcome the positive testimony of the plaintiff that the defendant is not only indebted to him upon this note but also on other accounts.

And now, May 15, 1893, the motion to open the judgment is overruled and the order to stay proceedings is set aside.

ASSIGNED ESTATE OF JAMES R. CONARD AND WIFE.

A and wife made an assignment for benefit of creditors, reserving in the deed the usual \$300 exemption. Before the wife would sign the deed she was promised by the husband that she should receive the \$300. There was no personal property, and the exemption was taken out of the real estate; the fund remained in the hands of the assignee. Before the auditor the fund was claimed by both husband and wife. *Held*, that the auditor had jurisdiction to adjudicate the proper distribution of this fund. *Held, further*, that the wife was the equitable owner of the fund, and the same was awarded to her.

EXCEPTIONS to report of auditor.

E. F. Slough, Esq., for exceptions.

H. U. Brunner, Esq., contra.

Opinion of the court by SWARTZ, P. J., May 15, 1893.

James R. Conard made an assignment of his property for the benefit of creditors. He reserved "so much as may be exempt from execution to the extent of three hundred dollars." The wife joined in the deed of assignment.

There was no personal estate, and the appraisers appointed to set apart property to the value of three hundred dollars, for the benefit of the assignor and his family, reported that "the real estate could not be divided without spoiling the whole; that it was necessary to sell the same." They "accordingly appraised three hundred dollars out of the purchase money to be paid by the said assignee to the said assignor, for the use of himself and family, out of the proceeds of real estate."

The assignee sold the real estate, received the proceeds, and paid certain liens. There remained in his hands three hundred and twelve sixty-two-hundredths dollars of this money. Before the auditor appointed to make the distribution two claimants appeared—the assignor and his wife. After deducting expenses of audit there are two hundred and seventy-four dollars for distribution.

The assignor claims the fund because of the appraisement made for the use of himself and his family. His wife contends that the money should be decreed to her because of an agreement made between herself and husband at the time she executed the deed of assignment.

The weight of the evidence clearly establishes that the wife at first refused to sign the deed of assignment; that the husband then declared if she would join in the deed the three hundred dollars ex-

Conard's Estate.

emption should be paid to her, or she should have the three hundred dollars. After this declaration she executed the deed.

No creditor appeared to contest the right of the husband to give to his wife this exemption money. The creditors do not in any way interfere in this controversy between the assignor and his wife. The money passed into the hands of the assignee in the administration of his trust.

The auditor awarded the fund to the assignor, giving as his reason that any other disposition would "contradict the record of the proceedings or change the direction the law has laid down for the disposition of the fund in the hands of the assignee."

The husband contracted the drink habit, and if the money is paid to him it is not likely that the wife will derive any benefit from the fund. If she can not recover the money under the present proceedings, it is not probable that any subsequent action against him will put the money into her hands. Her dower interest in the property may have had little value, but she parted with it under the agreement and she ought to receive the consideration. Her release no doubt gave the property a higher value in the market, and thereby benefited the husband by raising a larger fund to pay his debts.

That the husband may dispose of his reserved property as he pleases, where creditors do not interfere, can not be doubted: *Hildebrand vs. Bowman*, 100 Penna. St. R., 580. If the assignor had assigned the exemption fund in the hands of the assignee, or if the same had been attached by a creditor holding a judgment waiving the exemption, the right to the fund could have been adjudicated by the auditor appointed to make distribution of the funds in the assignee's hands: *Deweese's Appeal*, 2 Penny., 247.

The exemption necessarily went into the hands of the assignee because it was the proceeds of property which the assignee sold. The appraisement directed the assignee to pay out the money to the extent of three hundred dollars. The contest is therefore properly made before the auditor. While the claimants are not creditors, strictly speaking, they claim nevertheless through the assignment. As to the three hundred dollars the assignor and his wife imposed a trust upon the assignee. He took the property subject to the wife's right to receive three hundred dollars out of the estate. The wife executed the deed under this reservation, and the creditors are not here objecting to the execution of this trust.

That an award in favor of the wife "changes the direction the law has laid down for the disposition of the fund" can not help the assignor. He had the right, as we have shown, to dispose of the exemption; and if there is a change of direction he is not in a position to object to it, because he gave the order for the disposition. The appraisal was made in favor of the husband, but the wife under the agreement is the equitable owner of the fund; and we can see no difference between this case and one where she holds an assignment in writing in her favor. The husband was the owner of the three hundred dollars at the time the contract was made. The moment she signed the deed the consideration was paid, and she became the owner of the exemption. She said, according to the testimony of a witness, "If I sign then I am to have the three hundred"; he said, "You shall have the three hundred." Another witness says, "Mother, only sign the paper; you can have the money." The wife herself testifies, "I said 'No, sir; such a paper as that I will not sign.' Then he said, 'Mother, sign the paper; you shall have the money; I let you have it.'" The record does not show that there was any objection to the wife's testimony, but the agreement is established without her evidence. The husband admitted that he gave the three hundred to his wife. The witness Seipt says, "He told me *had given* his wife three hundred dollars." Under such testimony the wife acquired an equitable right to receive the money, and her husband is estopped from demanding it in the face of his agreement: *Patten vs. Wilson*, 34 Penna. St. R., 299.

And now, May 15, 1893, the exceptions to the auditor's report are sustained, and the sum of two hundred and seventy-four dollars, the balance in the hands of the assignee, is awarded, adjudged and decreed to Emeline W. Conard.

Orphans' Court of Montgomery County.

ESTATE OF GOTTLIEB MONK, DEC'D.

A wife living in a foreign country, and who has never formed part of her husband's family here, is not entitled to the benefit of the exemption act of 14th April, 1851, allowing \$300 to the widows of decedents.

EXCEPTIONS to widow's appraisement.

Wanger & Knipe, Esqs., for exceptions.

Childs & Evans, Esqs., contra.

Opinion of the court by WEAND, J., May 15, 1893.

In Berlin Beneficial Society vs. March, 82 Penna. St. R., 166, in speaking of the exemption act of 1851, the court said: "This bounty was intended for the benefit of the widow of the deceased, or in case he should leave no widow then for his children, the obvious intention being to aid and abet those who had been immediately dependent upon him for sustenance and support, and who by his death would be left helpless. This, however, can not be predicated of the plaintiff, for she was not of his family at the time of his death, nor had she been for many years; she had not performed the duties of a wife to Daniel March, and was in no wise dependent upon him for maintenance."

In Platt's Appeal, 80 Penna. St. R., 501, it was held that as the wife resided in Michigan at the time of her husband's death in Pennsylvania, she was not entitled to the exemption.

In Spier's Appeal, 26 Penna. St. R., 233, it was ruled that "a wife who has lived in a foreign country, and who never formed part of her husband's family here, is not entitled to the \$300 allowed by the act of 14th April, 1851, to the widows of decedents."

There is no evidence of desertion by the husband. It is not an unusual thing for emigrants to leave their families behind them when seeking a home in this country, relying upon their ability to afterward send for them; and from the fact that two at least of decedent's children followed him to Norristown, where they lived for

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years, the presumption is that the separation of husband and wife was amicable. There is no evidence that the wife ever desired to come or requested to be sent for. Under the decisions above cited she is clearly not entitled to the benefits of the act. She was no more helpless after his death than before; nor does it appear that she was dependent upon him for support.

And now, May 15, 1893, the exceptions are sustained and the appraisalment is set aside.

Court of Common Pleas of Montgomery County.

JAMES SUTHERLAND VS. WILLIAM ROSS.

When a case is called for trial in the Common Pleas, and the plaintiff, who is the mover in the cause, does not appear, either in person or by counsel, and no testimony is taken, the proper practice is to enter a non-suit.

In the absence of any testimony there is nothing for the jury to pass upon, and they can not therefore render a verdict for defendant.

MOTION to set aside verdict. No. 127, March T., 1893.

J. M. Arundel, Esq., for plaintiff.

Childs & Evans, Esqs., for defendant.

Opinion of the court by WEAND, J., May 15, 1892.

When this cause was regularly reached on the list the plaintiff was called, and did not appear either in person or by counsel, and no witnesses were called for him. A jury was impanelled and sworn, and directed to find a verdict for defendant. It is claimed by plaintiff that this action of the court was improper, and that our only authority was to order a non-suit.

So far as the result may affect the merits of the case we do not think that the plaintiff is injured, for he would not be prevented from bringing a new action.

To have this effect there must be two verdicts against the plaintiff upon a full view and consideration of the whole of his case, and all the circumstances connected with it which he might think material: *Mercer vs. Watson*, 1 W., 330.

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As the title to the land is the subject in dispute, it should be spread upon the record, so as to show that the verdict was rendered upon it. This was assumed to be the law in *Secrist vs. Zimmerman*, 55 Penna. St. R., 446, where Woodward, C. J., said: "An ingenious argument is submitted by learned counsel to prove that under the act of 13th April, 1807, nothing but two verdicts in ejectment and judgments thereon will bar the right; and that as a judgment by default or a judgment upon an award of arbitrators will not have this effect, neither will a judgment by confession."

To let the verdict stand would therefore not bar another suit by plaintiff, or be of any benefit to the defendant except for costs. We think, moreover, that our action was improper. The jury are sworn to try the case according to the evidence, and where none is offered there is nothing for them to consider or pass judgment upon.

The act of 30th March, 1812, Sec. 5, Sm. 361, provides the remedy when a plaintiff fails to appear and prosecute his case. The court is to direct a non-suit because the plaintiff does not follow up his suit. As he has the right, where he is the mover in the cause, to abandon his case at any time before the jury is called upon for their verdict, his absence at the time of trial is considered an election not to proceed with his case, which is equivalent to suffering a non-suit: *Thompson on Trials*, Vol. 2, Sec. 2229. The rule has its exceptions in cases where the defendant moves the plaintiff to proceed, or in some cases where the defendant, in the event of the plaintiff not succeeding, will be entitled to a judgment against him.

The penalty for a failure to appear is a dismissal of the cause, subjecting the plaintiff to the payment of costs before bringing a new suit; but as the merits of his case have not been submitted for hearing, there can be no judgment on them. Otherwise, on appeal or writ of error, there would be nothing for the Supreme Court to inquire into in order to grant relief but the exercise of the discretion of the court in refusing a new trial. The plaintiff could assign no error except that the court improperly forced the cause to trial; and as his absence might have been because of mistake, sickness, or other good causes, yet he would have a judgment against him from which he could not appeal with any hope of success, as the record would not disclose any error of the court. We therefore conclude that the judgment was improperly entered.

And now, May 15, 1893, the verdict is set aside and a new trial ordered.

HEINRICH SCHMIDT vs. A. H. MOORE.

The fact that one trespass may be consequent upon another does not so connect them as to allow one to be set off against the other.

MOTION for a new trial. No. 199, October T., 1891.

Wanger & Knipe, Esqs., for plaintiff.

J. P. Hale Jenkins, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., April 13, 1893.

The defendant offered to set off one trespass against another consequent upon it. This is not allowable: Hunt vs. Gilmore, 59 Penna. St. R., 450; Shaw vs. Badger, 12 S. & R., 275. One assault and battery can not be offered as a set-off against another, although just committed before the time of the assault complained of: Barthyte vs. Hughes, 33 Barb., 320.

We have our exact case in Lovejoy vs. Robinson, 8 Indiana, 399. Plaintiff gave evidence tending to prove that the defendant's cattle had broken into his field and injured his crops to the amount of seventy-five dollars. The defendant, against the plaintiff's objection, was permitted to prove that the plaintiff in driving the cattle from the field injured them to the amount of seventy dollars by beating them. The verdict in favor of plaintiff for five dollars was set aside by the Supreme Court of the state, the ground being that the "fact that one trespass may be consequent upon another does not so connect them as that they may be blended in the same action."

And now, April 13, 1893, the reasons for a new trial are dismissed and the new trial is refused.

GEORGE AXFORD VS. EDWARD THOMAS.

An agreement for the sale of a tract of land whose chief value consisted of a stone quarry, provided for its payment by installments, and contained this clause: "In case the party of the second part, by neglect or refusal to pay the aforesaid monthly installments, becomes more than three months in arrears, then the agreement to become null and void, and the party of the second part to forfeit to the party of the first part all the amounts paid by them and relinquish all claims against the party of the first part; the party of the second part to have the privilege of quarrying stone on the land as long as this agreement remains in force." *Held*, that upon failure to comply with conditions the forfeiture would be enforced.

MOTION and reasons for a new trial. No. 181, June T., 1892.

A. Edwin Longaker, Esq., for plaintiff.

J. P. Hale Jenkins, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., June 5, 1893.

In our charge we said "it would appear that the principal value of this three-acre tract of land was in the quarry." This expression is assigned for error. We did no more than indicate an opinion upon the evidence. We do not see how this could injure the plaintiff. So far as we have any evidence, the property had no productive value at the time, outside of the quarry. According to the plaintiff, a contract was pending by which a profit of about six hundred dollars a month would accrue to him in the operation of the quarry. At this rate the quarry was certainly of great value. The market value of the whole property was but thirteen hundred and fifty dollars, and comparing this value with the productive qualities of the quarry, it would certainly be natural to entertain an opinion that "the principal value of the property was in the quarry." If the property had anything else to give it greater value, there was no evidence of it.

When we said "here you have oath against oath," we did not mean to convey the idea that there was but a single oath in support of each side of the issue. We meant to indicate that there was a direct issue of fact between the parties on the question of waiver as to the forfeiture covenant. The context of our language clearly shows this. We stated fully the evidence of the two witnesses who are said to corroborate the plaintiff. Even if the jury had been instructed that the witnesses, Davis and Cloud, failed to corroborate

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the plaintiff, the error would not be serious. Mr. Cloud said: "I can not recollect whether the defendant said that he had made an arrangement by which he agreed that the plaintiff might go on, but he regretted it, or whether it was that he agreed that he might ship all the stone that he had taken out of that quarry." This evidence corroborates the defendant just as much as it does the plaintiff. The testimony of Mr. Davis is more favorable to the plaintiff. Still the witness heard but part of the interview, and may have inferred that the conversation related to the right to quarry, when, in fact, it may have referred to the right to remove the stone already quarried.

The third exception to the charge relates to the question of forfeitures. Did the defendant have the right under the contract to enforce the forfeiture?

The agreement provides: "In case the party of the second part, by neglect or refusal to pay the aforesaid monthly installments, becomes more than three months in arrears, then the agreement to become null and void, and the party of the second part to forfeit to the party of the first part all the amounts paid by them and relinquish all claims against the party of the first part; the party of the second part to have the privilege of quarrying stone on the land as long as this agreement remains in force."

The contract, in plain words, provides for a forfeiture of the money paid as well as a forfeiture of all rights under the agreement.

It is true, forfeitures are odious in law when they are unconscionable or work injustice, but where time is of the essence of the contract, equity will follow the law and will enforce a covenant of forfeiture as essential to do justice: *Brown vs. Vandegrift*, 80 Penna. St. R., 142. Parties may make time of the essence of the contract by an express agreement; if they do, the law will not make a new contract for them: *Becker vs. Smith*, 59 Penna. St. R., 472; *D'Arras vs. Keyser*, 26 Penna. St. R., 254; *Daudy vs. Pond*, 9 Watts, 49. If a covenant of forfeiture can be sustained between a landlord and tenant (*Brown vs. Vandegrift*, *supra*), how much more essential is such covenant to the contract now before us. The plaintiff was operating the quarry; the profits went into his pocket; the defendant had no share in these profits. Unless the defendant has some speedy remedy to protect himself, he may, without any compensation, lose his entire property. The installments may remain unpaid, and all of value in the property may be carted away.

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According to the evidence, the plaintiff was paying for the land with the stone he was taking out of it. The plaintiff had the advantage of securing a property without any ready money; the defendant stepped in, advanced the means to buy, and no doubt the covenant of forfeiture was introduced as a corresponding advantage to the defendant. The plaintiff had all to gain and nothing to lose. If the quarry proved valueless, he could abandon the property and leave it on the hands of the defendant; if it proved profitable, he could pay for the property with the income from the quarry. Time is material, and of the essence of the contract where the remedies are not mutual: *Westerman vs. Means*, 12 Penna. St. R., 97.

The plaintiff had the possession, and without the remedy by forfeiture the defendant was helpless. He might bring suit for the monthly installments, but before a final recovery of the money, even if such recovery were possible, the property may be ruined or valueless.

The defendant received seven of the monthly installments under the contract. If the quarry was as profitable as indicated by the plaintiff's evidence, then the forfeiture did not work any serious hardship.

The defendant is an old man of eighty years, and if the plaintiff lost the benefits of a good bargain by neglecting and ignoring the rights of the defendant he has no one to blame but himself. The jury found that the defendant did not waive the forfeiture, and the plaintiff can not truthfully say that he was injured by any act of the defendant.

It is said the plaintiff was a vendee in possession; but he was in possession not to make improvements but to diminish the value of the property. He does not fall within the class of cases where forfeitures are inequitable because of the loss of valuable improvements. In *Bodine vs. Glading*, 21 Penna. St. R., 50, the vendor was not required to convey after the expiration of the fifteen days fixed for the payment of the purchase money. The court said, "Commercial transactions would be greatly embarrassed and the grossest injustice would be done if the people are prohibited from making their own contracts."

We instructed the jury if they found there was no waiver of the covenant of forfeiture, then the damages due the plaintiff should be diminished by the amount of money due the defendant under the

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contract. It was agreed by the parties that there was due to the defendant, at the time suit was brought, the sum of one hundred and ninety-three and fifty-one-hundredths dollars for installments overdue. The suit was in assumpsit on the estrepement bond, but was nevertheless in fact a proceeding to recover damages for a breach of contract. The agreement gave the plaintiff the right to quarry; if the defendant unlawfully interfered with this right, then there was a breach of the original contract. The set-off grew out of the same transaction—it was money due the defendant under the contract. Why should there be two suits when each party is claiming the amount due him under the contract? Where the cause of action which the defendant wishes to set off arises out of the same transaction as that on which the plaintiff founds his action, both claims may be adjudicated by the same jury: *Steigleman vs. Jeffries*, 1 S. & R., 477. If the defendant had sued for the installments it is clear the plaintiff could have set up the breach of contract as a set-off, although the damages were unliquidated: *Domestic Sewing Machine Co. vs. Saylor*, 86 Penna: St. R., 287. No objection was made to the insufficiency of the defendant's plea to permit a set-off. If the plea of payment was necessary it could have been added at bar. The set-off was resisted on the ground that "the action though in assumpsit was an action in tort."

We conclude that the defendant's claim of set-off was properly admitted.

And now, June 5, 1893, the reasons for a new trial are dismissed and the new trial is refused.

Court of Quarter Sessions of York County.

IN RE GRAND JURY REPORT.

The grand jury, in their report, presented just before their discharge, reported that "the subject of demanding and taking fees by officers of the county in excess of those allowed by law received consideration; but owing to the time such an inquest would require, the difficulty to agree upon a method of procedure, and the want of knowledge of the law to make such investigation thorough and effective, they suggest to the court that the whole subject be entrusted for an investigation to a committee of persons learned in law and report of such examination to be made to the court as soon as possible." *Held*, that the court can take no action in the matter.

The court has no legal power or authority to appoint such a commission, nor to compel its members to serve if appointed, nor to provide compensation for their services if willing to serve.

The appointment, if made, being without authority of law, the report of such a commission would not afford any legal basis for any adjudication by us looking to the eradication of the evil if it exists.

The taking of illegal fees by any public officer is a highly criminal offence, and any person from whom illegal fees have been or shall be exacted can easily secure the prompt punishment of the offenders.

The excess of fees charged in any case can be recovered back on a civil suit.

All bills of costs in criminal cases, taxed and certified by the Clerk, should be carefully scrutinized by the counsel to the Commissioners before payment, especially as the county's liability for witness fees and mileage is confined to those witnesses who the District Attorney shall certify were subpoenaed by his authority, and were in attendance and necessary to the trial of the case. The Commissioners have the same right as private individuals to except to or appeal from the taxation of costs.

If any public officer exacts illegal fees he does so at his imminent peril, and every remedy, civil and criminal, should be unhesitatingly enforced against any one delinquent in this behalf.

Every attorney is bound by the good faith due to the client to protect him against every attempt at official extortion, and to resist any attempt at overcharge.

REPORT of the grand jury to the Court of Quarter Sessions of York county at the April term.

Opinion of the entire court, delivered May 1, 1893.

We have given careful consideration to all the suggestions made by the general inquest at the late term of the court, and desire to put on record our conclusions in regard to the matters embraced in the following paragraph quoted from the report: "The subject of demanding and taking fees by officials of the county in excess of those allowed by law, received consideration of the grand inquest. Owing to the amount of time such an inquest would require, the difficulty

to agree upon a method of procedure, and the want of knowledge of the law to make such investigation thorough and effective, the grand inquest have agreed to report this failure of discharge of an important duty on their part, for the reasons stated, to the honorable court, and therefore most respectfully suggest that the whole subject be entrusted for an investigation to a committee of persons, 'learned in law,' appointed by your Honors; and that of such examination of officials and records report be made to your Honors as soon as possible."

As stated by the Judge presiding at the time the report of the general inquest was presented, it contains the first information we have ever officially received on this subject. We have no personal or official knowledge of any exaction of excessive or illegal fees practiced by any of the court house officials of York county. It is true that some of the newspapers of the county have charged upon certain county officials the commission of this offence; but the matter has never been brought before us in any such way as to enable us either to correct the abuse, if really existing, or to punish the officers, if guilty. It is well known to every one familiar with the subject that there was a period in the history of York county when, in some of the court house offices, fee bills were little regarded and charges were regulated rather by the cupidity of the officers than by the provisions of the law. A storm of popular indignation, excited by the revelation of these unlawful practices, led to their abandonment. And we have believed that for many years last past the provisions of the fee bills were being strictly observed by the officials, and that charges in the court house offices were being made in substantial accordance therewith. Those members of the bar with whom we have discussed the subject agree with us in this belief. If this confidence in official integrity in the matter of fees, which we believe is shared not only by the bar but by the public generally, is unfounded, the sooner that fact is demonstrated the better it will be for the public interests. For the public should be amply protected from every form of official extortion.

While newspaper charges, made in the heat of partisan controversy, are not to be regarded by the courts of justice as affording any basis for official action, suggestions from the grand inquest, both as to the practice of official exaction and the necessity and the method of investigation, are to be received with great respect. The grand

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inquest is charged with the duty of presenting to the court all misdemeanors in office, as well as all other crimes and misdemeanors coming to their knowledge. Had the court been informed in time that the late grand inquest desired to investigate this matter, every opportunity would have been afforded them and all necessary information would have been given by the court, both as to the proper method of procedure and as to the law governing the quantum of fees. We greatly regret that they did not so inform the court, and that they made no presentment on this subject until the last day of their sitting, when about to be discharged. Their presentment of the result of such investigation would have put the court in possession of the facts; would have shown whether public confidence in official integrity was well or ill founded; would have vindicated innocent officials and led to the punishment of the guilty. For if it had revealed any instances of official extortion, bills of indictment against the guilty party would have been immediately sent before the grand jury, on their making proper presentment of the facts.

The late grand inquest did not in their report even assert the fact of the practice of official extortion by any public officer. They contented themselves with stating their inability, for the reasons given in the foregoing extract from their report, to make an investigation of this subject, and with suggesting to this court to make such investigation by a committee of "persons learned in the law." Unfortunately, we have no legal power or authority to appoint such a commission, nor to compel its members to serve if appointed, nor to provide compensation for their services if willing to serve. The appointment, if made, being without authority of law, the report of such a commission would not afford any legal basis for any adjudication by us looking to the eradication of the evil if it exists. For these reasons we can not adopt the suggestions of the late grand inquest and appoint a commission.

The taking of illegal fees by any public officer is a highly criminal offence, punishable by fine not exceeding five hundred dollars and imprisonment not exceeding one year. This is as it should be. Public offices are a public trust, to be exercised primarily for the public good and only secondarily for the private emolument. Any person from whom illegal fees have been or shall be exacted can easily secure the prompt punishment of the offenders. If for any reason reluctant to prosecute, he can make complaint to the District

Attorney, who, on ascertaining that the complaint is well founded, will direct his special detective to make a criminal information.

Besides this criminal proceeding against official extortioners, the excess of fees charged in any case can be recovered back on a civil suit.

It is to be regretted that certain civil remedies formerly available in cases of official extortion have fallen into abeyance. The act of 12th June, 1878, regulating the fees of public officers, contained the most salutary provision on this subject, under which any person injured by any overcharge of fees made by any public officer could recover from such officer three hundred dollars in an action for debt. But, unfortunately, that entire act was held by the Supreme Court to be unconstitutional as a local act, because by its terms made applicable only to counties having more than ten thousand and less than five hundred thousand inhabitants.

The act of 28th March, 1814, provided a penalty of fifty dollars for taking illegal fees, to be recovered by the injured party in an action of debt, and its provisions were extended so as to embrace several later fee bills; but, most unfortunately, the act of April 2, 1868, which is the fee bill now in force, affords no *civil* remedy against an officer charging excessive fees.

But the criminal proceeding above suggested is ample both for prevention and punishment, if invoked.

And, besides this, every attorney is bound by the good faith due to the client to protect him against every attempt at official extortion, and to resist any attempt at overcharge.

In the matter of the taxation of costs in the office of the Prothonotary and Clerk, an appeal lies from the officers' taxation to the court. It is fair to these officers to say that while appeals have not infrequently been taken, we can recall no case in which the taxing officers' own fees were in dispute or alleged to be excessive.

In any case in which excessive fees have been or shall have been charged to and paid by an executor, administrator or guardian, in the Register's or any other public office, the matter can be reached and the wrong corrected by exception to the account.

Since the passage of the act of 19th May, 1887, the county becomes primarily liable for the costs of prosecution in all cases of misdemeanor (as it was before in cases of felony) immediately on either the prosecutor or defendant being sentenced. For this reason it is

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obvious that all bills of costs in criminal cases, taxed and certified by the Clerk, should be carefully scrutinized by the counsel to the Commissioners before payment, especially as the county's liability for witness fees and mileage is confined to those witnesses who the District Attorney shall certify were subpoenaed by his authority, and were in attendance and necessary to the trial of the case. The Commissioners have the same right as private individuals to except to or appeal from the taxation of costs.

If any public officer exacts illegal fees he does so at his imminent peril, and every remedy, civil and criminal, should be unhesitatingly enforced against any one delinquent in this behalf.

The object of an investigation in this matter should be, first, to secure an authoritative adjudication in regard to the legal quantum of fees; and, second, to enforce the penalty against the guilty party. But any such adjudication, to be enforceable, must be based upon a proper legal foundation. Either of the methods hereinbefore suggested, viz., by criminal information and indictment, by exception to and appeal from the taxation of costs, by civil suit to recover the excess of fees, by exceptions to the accounts of executors, administrators or guardians paying fees in excess of the legal amount, will afford such basis of judicial action, and enable us to judicially ascertain and determine the proper fees due to public officers—an opportunity which we will be glad to embrace, and which would not be afforded by the report of a commission appointed without legal authority.

Court of Common Pleas of Allegheny County.

WILLIAM WILLIAMS VS. THE LAWRENCEVILLE AND EVERGREEN
PASSENGER RAILWAY CO. ET AL.

Fi. Fa. No. 45, July T., 1874.

SAMUEL REYNOLDS VS. SAME.

Fi. Fa. No. 71, July T., 1874.

Under the act of April 7, 1870, personal, mixed or real property (except lands held in fee), franchises and rights of a corporation, may be levied upon and sold on a fi. fa. without a return of *nulla bona* on a former fi. fa.

MOTION to set aside sale.

Opinion of the court by WHITE, J., June 5, 1874.

In pursuance of the foregoing fi. fa., and also of two others issued out of the Common Pleas, the Sheriff levied upon and sold all "the franchises of the Lawrenceville and Evergreen Railway Company, its hereditaments, appurtenances, rights, privileges, sidings, branches, ties, locomotive, passenger cars, tracks, etc.," to A. C. McCallum, Jr., for the sum of \$9,000, subject to certain mortgages on the same.

John F. Dravo, a stockholder in said company, by his attorneys, moved the court to set aside the sale, and filed the following reasons:

"1st. That under the act of April 7, 1870, the said railway could only have been sold on an alias fi. fa. after a return of *nulla bona* on a former fi. fa.

"2d. That under the act aforesaid the Sheriff can not make a bill of sale of the road to the purchaser, as no fi. fa., with return of *nulla bona*, had been issued in any of the above cases; also, because no demand was made prior to the issuing of the fi. fa., or prior to the making of the levy, as required by the act of Assembly."

Section 72 of the act of June 16, 1836, provides that on an execution against a corporation the Sheriff shall, first, go to the principal office of the corporation during the usual office hours and demand of the officer having charge of such office the amount of such execution, with legal costs; second, if no such officer can be found, and the amount be not paid, he shall seize personal property suffi-

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cient to satisfy the debt, interest and costs; third, if the corporation be a bank, he may take the coin; and fourth, if no sufficient personal property be found, he shall levy such execution upon the real estate of such corporation, which shall be sold in the same manner as real estate in other cases.

Section 73 of the same act then provides that when an execution shall have been returned unsatisfied, in part or in whole, the court may award a writ to sequester the goods, chattels and credits, rents, issues and profits, tolls and receipts from any road, canal, bridge or other work, property or estate of such corporation.

The act of April 7, 1870, provides that, in addition to the provisions of the seventy-second section above recited, and in lieu of the proceedings by sequestration under the seventy-third section, the plaintiff in any judgment against such corporation may have execution by fieri facias, on which the Sheriff may levy and sell any personal, mixed or real property, franchises and rights of such corporation, excepting lands held in fee.

This last act abolished the old, cumbersome and unsatisfactory system of sequestration, as decided by the Supreme Court in the Philadelphia and Baltimore Central Railroad Co.'s Appeal, 20 P. F. Smith, 355, and virtually repealed the seventy-third section of the act of June 16, 1836. It did not substitute a new section for the seventy-third, but made an addition to the seventy-second section. The seventy-second section stands entire, with this *addition*: That the Sheriff on his fi. fa. may levy upon and sell other property, which he could not have done as the section originally stood, namely, "any personal, mixed or real property (except lands held in fee), franchises and rights of such corporation."

Under the act of 1836 it was well settled that the road bed, the rolling-stock, rights and franchises of a corporation like this could not be levied upon and sold on a fi. fa.; hence the provision for sequestration. The object of the act of April 7, 1870, was to make them liable to levy and sale of a fi. fa. the same as other personal property.

Under the seventy-second section, as it stood prior to the act of April 7, 1870, the Sheriff was bound to seize and take in execution under his fi. fa. any property liable to levy under it. He had no right to return his writs *nulla bona* if he could find property liable to a levy. If he could find nothing but the road bed, the rolling-

stock, the rights and franchises of the corporation, he could not levy upon them, and was bound to return his writ *nulla bona*. But under the act of April 7, 1870, he is authorized to make a levy upon these and sell them. How then can he rightfully or truthfully make a return of *nulla bona*?

But it is argued that the first fi. fa. should be returned *nulla bona*, in order to give notice to the corporation. But in point of fact such a return may be no notice to the corporation, and in most of cases would not be. If the Sheriff does his duty under the seventy-second section, the corporation or one of its officers will have actual notice of the writ before a levy be made.

I can see no advantage, therefore, to a corporation, except a short delay, in requiring the first fi. fa. to be returned *nulla bona*. And as I do not think it is required by the letter or spirit of the act of April 7, 1870, the first reason assigned for setting aside this sale is not sufficient.

The second ground of complaint is that the Sheriff did not, before making his levy, demand payment of his writ from a proper officer of the company, as required by the seventy-second section. Doubtless that was his duty, for it is plainly and clearly pointed out in the section. And if we had before us the proper evidence of the fact that he had neglected this duty, and the corporation had been prejudiced or injured thereby, we might set aside the sale. But the presumption is that the Sheriff did his whole duty in the matter as required by law. We have no evidence to the contrary. There is no allegation that the corporation did not know of the writ, of the levy when made, or that the sale was not after lawful notice and for a full price. Neither the corporation nor any officer of it appears here excepting to the sale. We have nothing before us but the argumentative assertion of one of the stockholders, made by his counsel, and filed as a reason for setting aside this sale. This we regard as insufficient.

The exceptions are dismissed and the motion to set aside the sale is refused.

Orphans' Court of Montgomery County.

ESTATE OF JAMES BARNES, DEC'D.

The testator devised his estate to executors in trust to collect the income and pay the same to his widow for the maintenance of herself and minor children; if she should die or remarry during the minority of any of the children, the income to be paid to the guardian of the minors for their maintenance.

He directed that the balance of the income should accumulate "until my youngest child shall have attained the age of twenty-one years, or until the decease of my beloved wife if she should remain my widow so long." If widow married he directed his trustees "so soon as my youngest child shall have reached the age of twenty-one years to make equal distribution." *Held*, that distribution must await termination of minority of youngest child, although widow died before that time.

The widow having died, an application was made by certain children of the decedent, before the youngest child was of age for a citation to compel the sale and distribution of decedent's estate, which was refused.

PETITION for a citation.

Wm. F. Solly, Esq., for rule.

Childs & Evans, Esqs., contra.

Opinion of the court by SWARTZ, P. J., May 15, 1893.

A careful reading and study of the will of James Barnes brings us to the conclusion that distribution is not to be made until the youngest child attains his majority. This intent of the testator manifests itself throughout the will.

The son, John Joseph Barnes, is given the stock in the store at an appraised value, and has seventeen years in which to pay for the same. At the time the will was executed the youngest child was but four years old. By directing payment "within the period of seventeen years," the funds would reach the executors' hands in time for the period fixed for distribution. The seventeen years were not arbitrarily selected, but constituted the *period* he had in mind during which the estate was to remain in the hands of trustees.

The widow died before the youngest child attained his majority. The seventh clause of the will provides for this very contingency: "If the widow should die before my youngest child should attain the age of twenty-one years, * * * it shall be the duty of my

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trustees and I hereby direct them to make application immediately to the proper court for the appointment of a guardian of the person of all my minor children, and my said trustees are hereby directed to pay any such guardian appointed as aforesaid so much of the residue of my income * * * as may be necessary for the proper maintenance and education of my said minor children." That the trust is to continue during such minority is shown by the proviso: "If the duties of such guardianship will not interfere with the duties of trustee under this will, I would suggest the appointment of my son, John Joseph Barnes, as such guardian."

The ninth clause provides for distribution as soon as the youngest child reaches the age of twenty-one years. It is true, this direction is based upon the contingency that the widow may remarry before the youngest child becomes of age, but it is entirely consistent with the former provision of the clause, which speaks of accumulations during minority or until the decease of the widow, should she remain unmarried to the time of her death.

The testator provides for three contingencies: 1, death of the widow before the minors are all of full age; 2, remarriage of the widow; and 3, death of the widow after the children are all of full age. In the first part of the ninth clause he considers the third contingency, and declares that his estate is to accumulate until the youngest child attains his majority, or until the widow's death, "if this can be done consistent" with other directions. Accumulations are to continue at all events during minority, and, if possible, beyond that period, should the widow still live. The testator speaks of accumulations, not distribution, and he does not mean to contradict his former provisions as to the time of division, but expresses a desire to postpone the time of distribution in the event his widow should live beyond the period of time when all the children have attained full age. Read in this light, there is nothing in the ninth clause to sustain a distribution during the minority of any child.

And now, May 15, 1893, the citation is refused, and the petition is dismissed.

Supreme Court of Pennsylvania.

WILLIAM G. ARMSTRONG AND RHODA ARMSTRONG, HIS WIFE, IN RIGHT OF SAID RHODA ARMSTRONG, VS. UNITED STATES EXPRESS COMPANY, APPELLANT.

The Supreme Court will not grant a supersedeas where the writ of error is served after three weeks from the date of judgment, and in the meantime a levy has actually been made under an execution issued on the judgment.

RULE to show cause why supersedeas should not be granted.

The facts appear from the following petition filed in the case:

To the Honorable the Justices of the Supreme Court of Pennsylvania:

The petition of J. S. Freemann respectfully represents:

That he is of counsel for the United States Express Company, the appellant in the above case and defendant in the court below; that on the 19th day of April last a verdict was rendered against the said defendant and in favor of the said plaintiffs in the sum of \$850; that a motion for a new trial was made which the court, after argument, refused on June 5, 1893; that on June 6, 1893, the jury fee was paid by the plaintiffs' attorney and judgment entered on the verdict the same day; that several days after the information was received that judgment had been entered upon the verdict, this information was forwarded to the chief counsel of the defendant in New York, with a request for further instructions in reference to the matter.

Whether by reason of the absence of the chief counsel from his office or for some other reason unknown to your petitioner, no instructions were received until either Saturday the 24th or Monday the 26th day of June ult. On the 27th day of June your petitioner wrote to the attorney for the plaintiffs requesting an interview, not thinking for a moment that plaintiffs' attorney had any intention of issuing execution upon said judgment without first making a demand for payment thereof or notifying your petitioner that unless the judgment was paid or an appeal taken execution would issue; more particularly so since it is well known that the defendant is entirely responsible and able at any time to pay the amount of said judgment.

Your petitioner was misled by believing that such courtesy would be shown him, particularly since plaintiffs' counsel was in-

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formed of defendant's intention to take an appeal in case a new trial was refused, at which time plaintiffs' attorney expressed himself to to the effect that he rather preferred a new trial would be granted.

On the 28th day of June, although after the writ of fi. fa. had been placed in the hands of the Sheriff of Montgomery county, an appeal was entered in the Supreme Court, which was perfected by the entering of security on June 29th and the issuing of a writ of certiorari to the Common Pleas of Montgomery county.

Your petitioner is further informed, believes and avers that if defendant is obliged to pay said judgment before the appeal has been decided by your Honors, no part thereof could probably be recovered back from the said plaintiffs in case the said judgment should be reversed. No injury will be suffered by the plaintiffs in case the rule is made absolute except the delay in the payment of the said judgment, for which, should the judgment be affirmed, the plaintiffs will be entitled to interest; whereas by a refusal to grant a supersedeas the defendant may suffer a grievous wrong.

Your petitioner therefore prays your Honors, on behalf of the said defendant, to grant the prayer of the aforesaid petition by making the said rule absolute, and order and direct that the said appeal shall act as a supersedeas with the same force and effect as if the same had been taken within twenty-one days of the date of the judgment, upon the payment of the costs of the execution.

The rule was argued by

Keator & Freemann, Esqs., for rule.

Isaac Clism, Esq., contra.

A writ of error is not a supersedeas, unless served within three weeks, if a levy under the execution has actually been made before the writ of error has been served: *Bozarth vs. Marshall*, 1 Philada., 172; *McDonald vs. Gifford*, 6 Id., 316; *Neuer vs. Scholken*, 5 Kulp, 133; *Taylor vs. Breish*, 8 Penna. C. C., 286.

As to effect of certiorari: *Ewing vs. Thompson*, 43 Penna. St. R., 377; *Penna. R. R. vs. Com.*, 39 Id., 403; *Rheem vs. Naugatuck Wheel Co.*, 33 Id., 356.

Opinion of the court delivered July 19, 1893.

PER CURIAM.—Rule to show cause why a supersedeas should not be granted discharged.

Orphans' Court of Philadelphia County.

McAVOY'S ESTATE.

After four years from the discharge of a guardian on his own petition, and transfer of the estate to his successor, his account will not be reviewed without proof of fraud or concealment.

Where a guardian who is a surviving partner of the ancestor purchases the decedent's interest in the business, and without paying the cash charges himself as guardian with the price, the ward has the election to demand interest or a share in the profits.

But where the guardian has regularly charged himself with interest, and has settled his account upon that basis, which was accepted by his successor, and the balance paid, the new guardian, in the absence of proof of fraud, concealment or ignorance, will be deemed to have elected, on behalf of the ward, to accept interest.

PETITION for review.

J. R. Morgan and Z. T. Moore, Esqs., for petitioners.

Walter E. Rex and John G. Johnson, Esqs., for respondent.

Opinion of the court by HANNA, P. J., July 8, 1893.

This is a petition for a review of the account of a guardian. From the petition and answer it appears he was the brother-in-law and partner in the business of brick-making with the father of the minors. Upon the death of his copartner it was quite natural that the surviving partner was desirous of purchasing the interest of his deceased partner in the firm, although he avers "I was also quite ready to sell my interest therein." And from the precarious nature and character of the assets of such a business enterprise, viz., the right to dig clay, brick-kilns, burned and unburned bricks, tools, horses, carts, sheds, book debts, and perhaps bonus houses finished and unfinished, with the intangible good-will of a brick-yard, it may with good reason be asserted that such a settlement of the partnership will almost universally be for the best interest not only of the surviving partner but the estate of the deceased partner; and it is palpable that other than such an amicable arrangement might be made to work to the great pecuniary advantage of the former but at a sacrifice and irremediable loss to the latter.

The father of the minors died in April, 1876, leaving surviving him a widow and six minor children, and his surviving partner was

appointed guardian in July, 1876; but he expressly denies by his answer that he procured himself to be appointed, "if by the word 'procured' it is meant to imply that I did anything other than accept an appointment as guardian made at the request of those interested in the minors and for their benefit." And "it was with no expectation or desire of facilitating any purchase of such interest that I accepted the appointment of guardian of said minors." The interest of the father of the minors in his late firm was appraised by "impartial appraisers" of the value of \$51,396.67, in which the widow and children were interested in the proportion provided by the intestate laws. We presume this appraisement was satisfactory to the widow, as nothing appears to the contrary. And the administrator of the deceased partner sold at private sale, upon credit, his decedent's interest in the firm to the surviving partner. This he admits by his answer; but he also avers the condition upon which he became the purchaser was that "time should be given for the payment of the purchase money, and payment of the purchase money was made by my bond secured by a mortgage which was accepted by said administrator. The settlement was made in the interest of the minors, * * * and with the full knowledge and approval of all the adults who were interested in said minors, and with the approval of not only the administrator but of the widow." In pursuance of this purchase the guardian and surviving partner continued to carry on the business as he and his late partner had done, and charged himself with interest at the rate of six per cent. per annum upon the value of the minors' share of the consideration money, and which interest or income he expended as guardian in pursuance of an order of court for the support and maintenance of his wards. Subsequently three of the minors became of lawful age, and were paid by their guardian the amount of their estate in his hands. That this was satisfactory to them is shown from the fact that neither now alleges any error in the settlement, or unfair or improper dealing, on the part of their former guardian.

In November, 1888, nearly thirteen years after his appointment, the guardian, anxious to be relieved from the further care of the minors, filed his account with a view to be discharged from his trust; and, in accordance with the act of March 29, 1832, *Purd.* 515, pl. 48, the court appointed the Commonwealth Title Insurance and

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Trust Company "to appear and act for the wards in respect to the settlement of such an account."

On January 8, 1889, the account, in which the guardian is debited with the principal of his three remaining wards, derived from the sale to him of their father's interest in the business mentioned, together with interest thereon at six per cent. per annum, was duly audited by the court. The minors were represented by their next friend, appointed by the court, and, no objection being made thereto, the account was confirmed nisi and the balance awarded to a new guardian to be appointed. Subsequently the account was confirmed absolutely, the guardian, upon his own petition, discharged from the trust, and an older brother of the minors, who himself had been a ward of his uncle, the late guardian, was appointed guardian in his place and stead. This was in January, 1889, and the late guardian paid to his successor the amount found by the court to be due the minors. Up to this time no fault was found with his management of the estate of his wards.

In February, 1890, one of the three minors became of lawful age, and her brother, the then guardian, promptly filed his account, and the balance due her was awarded to her. But no objection to the account of the former guardian was yet suggested either by the late minor or her new guardian. In November, 1891, another of the minors attained his majority, and his guardian, his brother, again promptly filed an account, and the balance of his estate was awarded to him. And still no objection, by either of the two late minors who had reached lawful age or their substituted guardian, to the correctness of the account of the former guardian, which was confirmed, as already stated, in January, 1889. Nor until March 4, 1893, more than four years thereafter, upon the filing of the present petition, was any intimation given to the late guardian that the settlement made by him of his wards' estate, with the sanction and approval of the court, and his final discharge from the duties of his trust, was in the slightest degree incorrect or unsatisfactory to his late wards. Nor is this long delay explained by the petitioners. One of them, the guardian of the remaining minor, was, as before mentioned, a ward of the late guardian, and it is a significant fact that he personally is not a party to this proceeding, and alleges no error in the settlement with him. He became of age before the account now sought to be reopened was filed, knew of its being filed,

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and if not present at the audit received from his uncle the amount awarded to his sister and brothers without objection, and, it may be safely assumed, was fully aware that his uncle bought his father's interest in the business, and, instead of paying out at once the valuation in cash, retained it in the business, paying therefor six per cent. interest per annum.

And so with the two wards who became of age in 1890 and 1891. They were fully informed of the settlement of their estate, and need not have waited three years before seeking correction of an alleged error and omission of their former guardian.

Again, the petition alleges neither fraud, deception, concealment nor misrepresentation by the former guardian, but merely that he purchased their father's interest in his firm, and, instead of paying cash therefor, retained it as an investment in his business, paying therefor the legal rate of interest. While it is true the guardian should have secured the wards' share in the consideration of the purchase other than by the entry of security as guardian, yet, if unable to pay the money, he chose to treat it as an investment, he rendered himself liable to pay to his wards, at their option, either legal interest therefor or a proportionate share of the profits gained by the use of the investment. And this is settled by a long line of authorities: Robinett's Appeal, 36 Penna. St. R., 174; Seguin's Appeal, 103 Id., 139; Small's Estate, 24 W. N. C., 92; and other cases.

Here the record shows the wards, or their guardian for them, made their election, and elected to take interest instead of a share of the profits. The account of the guardian, in which he charged himself with six per cent. interest, was agreed to by the next friend of the minors and by the new guardian appointed upon the final discharge of the former guardian, who was fully acquainted and familiar with his management of the minors' estate, and who, as already mentioned, without objection, received from the then guardian the balance due the minors. If it was intended to surcharge the late guardian with profits, then was the time to present the claim, and not accept interest, admit the correctness of the account, and agree to the final discharge of the guardian. All of the facts now alleged were then known to the petitioners and their guardian, and to the widow and the children who had reached their majority. After this lapse of time, in the absence of any fraud, or concealment, or ignorance on the part of the new guardian, the application to now set

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aside the confirmation of an account and the decree of the court, made with full notice to all parties interested and in good faith, does not commend itself to the favorable consideration of the court. We must take the answer as true, and from the facts stated in the answer, without further testimony, the petitioners are not entitled to a review. They are, however, given leave to file a replication and take testimony in support of the petition.

Court of Common Pleas of Montgomery County.

SEBASTIAN SHULTZ VS. JOHN WUNDERLICH.

Upon a contract to sell real estate a portion of the purchase money was paid down at the execution of the agreement, and the vendee took possession.

The vendor had not acquired title, but had merely entered into an agreement to purchase; and upon a bill to compel specific performance by his vendor the Supreme Court refused the decree. *Held*, that the last vendee in an action of assumpsit could recover back the down money.

He could do so although he had not tendered the balance of the purchase money.

His vendor contracted to sell moonshine, and was estopped from requiring a tender of the balance of the purchase money from the vendee in order to rescind the contract.

SUR MOTION for a new trial.

Opinion by YERKES, President Judge of Seventh District, sitting at special court March 21, 1889.

The defendant entered into an agreement with the plaintiff in March, 1884, by which he undertook to convey to him on or before October 1st following a messuage and tract of land in Upper Salford township, Montgomery county, in fee simple, clear of all incumbrances. The consideration was fixed at \$1,900, of which \$300 was paid by the plaintiff at the execution of the agreement, and as provided therein. When Mr. Wunderlich made the agreement he had not acquired title to the premises, but had entered into an agreement to purchase the same of one Margaretta Alexander, he to receive possession April 1, 1884.

Through his own default in not performing his part of this latter contract he did not obtain title from Mrs. Alexander, and on January 8, 1885, he filed a bill against her to compel specific performance of the contract.

The court decreed performance, but the Supreme Court reversed the decree and dismissed his bill. Vide Alexander's Appeal, 21 W. N. C., 28.

Mr. Wunderlich failed to acquire title at any time to the premises, and consequently could not convey to Mr. Shultz such an estate as the contract called for. Mr. Shultz moved upon the premises about April 1, 1884, and remained there for over a year. He brought this suit to December term, 1884, to recover back the \$300 paid by him in cash at the time of the execution of the agreement. Mr. Wunderlich is deceased, and the suit now stands against the executor of his estate.

It did not appear that before bringing the action Mr. Shultz demanded of Wunderlich a conveyance according to the terms of the agreement, or declared his readiness to comply with his part of the contract.

The defendant resisted a recovery. Because:

"1. The plaintiff had no right to rescind the contract without first showing a demand for a deed and a refusal by the defendant to convey.

"2. The defendant was not bound to convey to the plaintiff until he had offered to pay the balance due upon the contract.

"3. As the covenants were mutual, neither party was in default until a demand and refusal.

"4. As the plaintiff was placed in undisputed possession of the land by the defendant, the mere fact that he had received no deed did not justify a rescission of the contract.

"5. Time was not of the essence of the contract.

"6. Assumpsit will not lie to sustain this action."

He relies principally upon *Allison vs. Montgomery*, 3 Out. (99 Penna. St. R.), 460, and *Tiernan vs. Blackstone & Roland*, 3 Harris, 42, as authorities to defeat the claim.

Both these cases differ from the one under consideration in that in each of them the vendor was able to convey the estate contracted for at the time when the contract was to be executed, while in this case Wunderlich never was able to make good his undertaking.

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Unlike the case of *Tiernan vs. Roland & Blackstone*, his equitable estate in the premises never was converted into the legal estate in fee simple which he undertook to convey; in fact, his effort to so convert the estate was utterly and finally defeated by the ruling of the Supreme Court, so that the representative of his estate does not now make even a pretence of having any estate in the premises in question. The failure to obtain a specific performance of the contract cut up by the roots whatever equitable interest he was supposed to have in the land, and conferred upon Mrs. Alexander the right to dispossess him and to resume her absolute ownership; so that, though, at the time Wunderlich and Shultz contracted the former was supposed to have an interest in the land and Shultz's possession was understood to be under him, yet, as a matter of fact, his possession was one which rendered him liable to attorn to Mrs. Alexander, a stranger to him.

This was not a mere mistake of law, but of fact, arising from Wunderlich's failure to do what was necessary to convert his equitable estate into the fee simple estate which he was to convey: *Gross vs. Leber*, 11 Wr., 526. Shultz was in no manner responsible for this state of affairs, and was not required to know or to anticipate Wunderlich's inability to perform his contract.

This is not in the class of cases where it is necessary, before a rescission of the contract can be made, that the vendee shall show that he has rescinded the contract by doing or offering to do all that was necessary and reasonably possible to restore the parties to the condition in which they were before the contract. That class of cases is numerous, and, where applicable, their authority can not be doubted. In all of them the law is thus held, not simply because of an arbitrary rule but upon a rule founded in the reason that while the law will give a remedy to the complaining party it will also require him to restore to his opponent what is fairly his: *Piersol vs. Chapin*, 8 Wr., 12, and cases there cited. When the reason does not exist the rule fails; therefore it applies only to cases where there is something to be done or restored so as to place the defaulting party in his former situation.

In this case there was nothing to which Wunderlich was entitled from Shultz before his obligation arose to return the purchase money. Whatever may have been the belief of the parties, Shultz bought nothing; the subject matter of the sale turned out to be

moonshine. Therefore what could he have done to have reimbursed Wunderlich before he should return the \$300 belonging to Shultz, and which it was clearly his duty to return to him.

It was urged that it was the duty of Shultz to tender the balance of the purchase money and demand a deed before he could rescind. This rule applies where one seeks to enforce a contract and to obtain what he bargained for; but it can not be invoked where it is beyond the power of the vendor to give a title, and when admittedly he has nothing to convey, and where it is useless for the vendee to attempt to obtain from the vendor what can not be given him.

The law is not so absurd as to compel a vendee to resort to the circuitry of paying the purchase money for no other purpose than to give him the right to sue for its return, and at the risk of losing it altogether. If it will not require him to pay it, there is no reason why he should tender it. If a person sells lands to which he has no title, he shall not recover the consideration money; no man is obliged to pay for moonshine: *Davis vs. Houston*, 2 Yeates, 289.

The class of cases applicable to the facts before us is as distinct and well considered as is that already referred to.

In *Stoddard vs. Smith*, 5 Binney, 365, Yeates, J., said: "I fully agree that in this state, where courts of justice exercise certain equitable powers, a man will not be compelled to pay for lands which he has purchased, though even with general warranty, where it plainly appears he can not obtain a good right therefor. Why should a payment be enforced which when made can not be retained? Why should this circuitry of action be permitted, when the insolvency of the seller of the lands or other untoward circumstance may prevent the recovery of the money back?"

In *Gans vs. Renshaw*, 2 Barr, 34, the title was defective because of quit rents. The court below instructed the jury that if the vendee was unwilling to complete the title, on account of defects, he was bound to give up the possession and rescind the contract. But Gibson, C. J., in reversing the judgment, said: "It is said it was his (the purchaser's) duty, if the title was not such as he had bargained for, to give back the possession and declare his determination to abandon the contract; and for not having done so he is to pay a sound price for an unsound title. * * * But whose business was it to move towards a rescission of the contract? Not the defendant's (the buyer). He was at liberty to fold his arms and await the movements

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of the plaintiff, whose cue it was to take the next step towards an abandonment or a completion of the purchase. It was not for the defendant to know what title the plaintiff should be able to make when he should come to tender the conveyance. The plaintiff's power to perform his part was best known to himself; and if he found the defect in his title to be irreparable, what was he to do? Certainly not to bring an action for the purchase money in order to force a rotten title on the purchaser of a good one, and this on the basis of his own default. It would be his duty to apprise the vendee of his inability, restore whatever had been paid, and demand the possession."

In a later case the Supreme Court decided that where a vendor is confessedly unable to make title at the time named in the articles of agreement for delivery of the deed, no tender of the purchase money then due is necessary to enable the vendee to rescind the contract and maintain covenant for the breach. Mr. Justice King said: "When the vendor expressly admitted that he could not convey free from encumbrances, there was no necessity for a tender": *Kirst vs. Kuider*, 3 Pittsburg R., 213.

Allison vs. Montgomery is not in conflict with these cases. There the admission of the vendor that he did not intend to convey was rejected as evidence, to relieve the vendee, because he gave as his reason for this position that he never entered into the contract. And the Supreme Court very justly said: "If, therefore, we are to give force to his testimony, there is (not) now and never was any foundation to the plaintiff's claim." But the case indicates that if he had not denied the contract it would have been different.

These cases establish that neither a tender of the balance of the purchase money nor a demand upon Wunderlich for a deed was necessary before the action could be commenced.

Then, has the plaintiff a right to recover and in this form of action?

We hold that he can recover the purchase money paid by him as upon a consideration which has failed.

In our state equitable principles are of necessity adopted in the administration of justice by the courts of law.

The right to recover has frequently been decided. Thus, upon a bill to refund purchase money for an estate to which the defend-

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ant had no title, though it was supposed he had, a decree was made for repayment with interest. The court would not suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right: *Bingham vs. Bingham*, 1 Vesey, Sr., 126; 1 Story on Equity, 141, 142.

Upon a bill to restrain the collection of money which had been paid for stocks which could not be delivered, it was argued if the money had been paid surely equity would not have compelled it back again. To which the master of the rolls replied: "It is against natural justice that any one should pay for a bargain which he can not have. There ought to be *quid pro quo*. But in this case the defendant has sold the plaintiff a *bubble or moonshine*." The judgment was: "The seller in this case was the chief actor; he went to market with the bubble. And since no transfer can be made, let there be a perpetual injunction": *Slent vs. Bailiss*, 2 Peese, Wms., 247. See also *Allen vs. Hammond*, 11 Peters, 62.

Upon a sale of a supposed title where, as a matter of fact, the seller had no title, it was held that his deed afforded no consideration for the price paid, and it could be recovered back in an action: *Martin vs. McCormick*, 8 N. Y., 331.

The same was held in Massachusetts. *Thompson vs. Gould*, 20 Pick., 134. See also *Gangwer vs. Fry*, 17 Penna. St. R., 495; *Pearsol vs. Chapin*, 44 Id., 16.

We are of the opinion that the plaintiff is justly entitled to recover upon the action which he has brought; that the objections to his right to do so savor more of technicality than of merit; that they are insufficient; and that to allow them to defeat a recovery would do gross injustice.

And now, March 21, 1889, the rule for a new trial is discharged and a new trial refused.

Court of Quarter Sessions of York County.

COMMONWEALTH VS. JOHN T. NORRIS.

On the trial the District Attorney asked leave to amend the indictments. The defendant alleged surprise, and the case was continued. A new information was made and new indictment found. A motion to quash this indictment because the first was still undisposed of was overruled. *Held*, not to be ground for a new trial.

A man can be held on two or more indictments at the same time, for the same offence, and a pendency of one will not bar proceedings on the other.

If the defendant regarded the second arrest illegal, during the pendency of the first prosecution, he should have sought his release in a *habeas corpus* or a motion to quash the information.

The accused had a right to have the bill first found disposed of before pleading to the second bill or going to trial, but contented himself with a motion to quash the *second bill*. He should not now complain because that was not done which he did not ask.

Defendant, at the time of negotiating the alleged forged note, represented that J. B. Miller, the drawer of the note, lived at or near Cross Roads, and that the note would be paid at maturity. *Held*, that it was proper for the Commonwealth to prove that no such person lived at or near that place.

Defendant offered to prove that subsequent to the discounting of the note a letter was addressed to one J. B. Miller at Red Lion, and received at said post-office, distant three miles from Cross Roads. It was not stated in the offer that the alleged letter was ever taken from the office by J. B. Miller or that he was ever seen in the neighborhood by a single witness. *Held*, that the offer must be rejected.

MOTION for a new trial.

The reasons filed for a new trial were as follows:

1. The court erred in overruling defendant's motion to quash the indictment.

2. The court erred in admitting the evidence of the Commonwealth that no such person as J. B. Miller lived near Cross Roads, in Hopewell township.

3. The court erred in rejecting defendant's evidence that a letter was received by the postmaster at Red Lion directed to J. B. Miller, and that the same was read and opened by J. E. Miller, and the contents of the letter to the effect that it was a notification to said J. B. Miller that his note to the Singer Sewing Machine Company was due.

4. The court erred in its charge to the jury in putting too much stress on the necessity of the defendant proving that there was a man whose post-office was Cross Roads by the name of J. B. Miller.

5. The court erred in its charge in treating very lightly the proof of the defendant that there was a man who gave his name as J. B. Miller, and his transactions in connection with said note with the defendant.

6. The verdict is against the weight of the evidence and the law in the case.

Geo. B. Cole and H. H. McClune, Esqs., for motion.

W. A. Miller, E. D. Bentzel and N. M. Wanner, Esqs., contra.

Opinion of the court by BITTENDER, J., June 19, 1893.

The above named defendant was indicted and convicted of the offence of willfully and fraudulently making and uttering and publishing the promissory note described in the bill of indictment, particularly involving the signature of Ed. C. Peeling to said promissory note as endorser, with intent to defraud, under the 169th section of the penal code of 1860.

An indictment for the same offence was found against the defendant at August sessions, 1892, being No. 118 of said sessions.

On the 1st day of November, 1892, a jury was called and sworn in said No. 118, August sessions, 1892, and the trial proceeded until the Commonwealth offered in evidence the alleged forged promissory note, when it was found that the indictment was defective in its description of the signature of Ed. C. Peeling, the signature as charged in the bill being E. C. Peeling.

A motion was made by the District Attorney to amend the indictment. The defendant alleged surprise, and the court, without objection, withdrew a juror and continued the case. No further disposition was made of the motion to amend, and nothing further has since been done in and about the said first found bill. Subsequently a new information was made by the prosecutor, and at January sessions, 1893, the new bill was found, upon which the defendant was convicted.

A motion was made by the accused to quash the last mentioned bill, viz., the bill found at January sessions, 1893, at the proper time, because another bill for the same offence was still pending and undetermined. See motion filed. The motion to quash was overruled, the defendant ordered to plead, and a trial of the accused on the new bill was proceeded in.

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If the defendant regarded the second arrest illegal, during the pendency of the first prosecution, he should have sought his release in a *habeas corpus* or a motion to quash the information.

Having neglected or failed to avail himself of the remedies at hand, and having entered bail for his appearance at the next sessions, his application to quash the second bill was without force or merit, and the motion was properly overruled.

The bill first found was admittedly defective, and had the defendant asked to have it quashed or a *nolle prosequi* entered by Commonwealth before pleading to the second bill or proceeding with the trial, his request would have been promptly granted by the court. Like proceedings would have been had at the instance of the Commonwealth. The accused had a right to have the bill first found disposed of before pleading to the second bill or going to trial, but contented himself with a motion to quash the *second bill*, to wit, No. 27, January sessions, 1893. He should not now complain because that was not done which he did not ask.

The finding of a bill does not confine the state to that single bill; the state may enter a *nolle prosequi*, another bill may be found during the pendency of the first bill and the party put to trial on it: 1 Whar. Am. Crim. Law, Sec. 521; see *Id.*, Sec. 547, ed. of 1861. 1 Roscoe's Crim. Ev., 307, is authority to the same effect.

A man may be held on two or more indictments at the same time, for the same offence, and the pendency of one will not bar proceedings on the other: 1 Bish. new Crim. Law, 1014; *Rex vs. Dunn*, 1 C. & K. 730, 47 E. C. L.; *Com. vs. Drew*, 3 Cush., 279.

The foregoing authorities are followed in Pennsylvania: *Smith vs. Commonwealth*, 104 Penna. St. R., 339; *Com. vs. Schall and Danner*, 6 York Legal Record, 27.

The second reason is that the court erred in permitting the Commonwealth to prove that there was no such person as J. B. Miller, who was represented to be the drawer of the note, at or near Cross Roads, in York county, Pa. It will be remembered that the evidence of Jere Carl, one of the directors of the York County National Bank, and through whose intervention said bank discounted the note, showed that John T. Norris, when he came to him with the note, said that J. B. Miller lived at Cross Roads and

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that the note would be paid at maturity. The note was offered and admitted in evidence and showed the penciling or marking on the same sworn to by Jere Carl, according to said evidence and the alleged representations of the accused. The note also appears to have been filled up, signed with the name of the alleged maker thereof, and the endorsements of Ed. C. Peeling and John T. Norris, all to be in the same colored ink and the same handwriting. Indeed, after a careful examination, we are satisfied and are still convinced that all the writing on said note, except that noted upon it by Mr. Carl, was done by the same person.

Undoubtedly this was a question for the jury to determine, from all the evidence, an inspection of the writing, and a comparison with the test papers in evidence. But in the light of the evidence given by the Commonwealth's witnesses, why was it not competent to prove in chief that the statements of the accused to Jere Carl at the time of obtaining the discount were false, and that no person of the name of J. B. Miller, the alleged drawer of the note, lived at that time or about that time at or near or Cross Roads, for the purpose of showing the fraudulent nature of the pretences of the accused; that the writing of the signature of Ed. C. Peeling was the work of another, and that even the pretended signature of J. B. Miller was written by another party interested in the note—a state of facts entirely consistent with the appearance of the note alleged to have been fraudulently made and altered, and in evidence?

We think the evidence was properly admitted as part of the Commonwealth's case. The court necessarily excluded the offer of the defendant to prove that subsequent to the discounting of the note a letter was addressed to one J. B. Miller to Red Lion, and received at said post-office, distant some three miles from Cross Roads. It was not even stated in the offer that the alleged letter was ever taken from said office by J. B. Miller, or that he was even seen in that neighborhood by a single witness. This proposed evidence of the defendant was as void of substance as a shadow. It did not show or tend to show the presence of J. B. Miller at Cross Roads at the time of the making of said fraudulent note, or, indeed, that such a man existed. The second and third reasons can not be factors in producing a new trial in this case.

The fourth and fifth reasons assign error in the charge of the court. Our recollection is that the case was fairly submitted to the

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jury upon the evidence, with the usual instruction that it was their duty to acquit the accused unless the evidence satisfied them of his guilt beyond a reasonable doubt. The fact that our attention was not called to any errors during the delivery of the charge, or afterwards before the jury retired, satisfies us that the charge was fair and not open to complaint.

In our opinion the verdict was warranted by the evidence, and we decline to disturb it. For the reasons stated the motion in arrest of judgment and for a new trial is overruled.

Rule discharged.

Court of Quarter Sessions of Schuylkill County.

SUMMA'S LICENSE.

Where a retail liquor license was granted for a full year, and the licensee, during his term of license, absconded, the license may be transferred to the owner of the licensed premises, notwithstanding that creditors of the licensee offer an applicant who is willing to pay a considerable sum for the same.

In such case the court may require the transferee to pay to the parties legally entitled thereto so much of the license fee as is proportioned to the unexpired part of the term.

The power of Courts of Quarter Sessions to transfer licenses, even without the consent of the licensee, is discretionary; its lawful exercise is not reviewable by the Supreme Court, and a writ of certiorari to the judgment of the lower court does not supersede the transfer.

The creditors of a licensee have no interest or right in his license, as creditors, that can effect its transfer to another.

Doubted, where the Court of Quarter Sessions has power to determine the effect of a writ of certiorari taken from the judgment of that court to the Supreme Court.

RULE to show cause why order of court directing transfer of license should not be revoked.

In 1892 Paul Summa obtained a transfer of the license which had been granted to the property of Mrs. Kate Breen, situate at Shenandoah, and at the January session, 1893, a license for the full term of the current year was granted to him. The license fee was paid by Mr. Summa, and regularly taken out by him within the required time, and a license certificate issued in his name by the clerk of the court. On February 15, 1893, Summa suddenly decamped

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from Shenandoah, leaving a number of creditors, among whom was Mrs. Kate Breen, to whom he was largely indebted for rent, and several wholesale liquor dealers. The personal property of Summa was levied on by J. J. Franey, agent for Mrs. Breen, under a landlord's warrant, and subsequently sold. Mrs. Breen then filed this petition to have the license heretofore granted to Summa transferred to her. To this the other creditors made objection, alleging, *inter alia*, that Summa had verbally stated before leaving Shenandoah that his creditors who had furnished him liquors should have the benefit of the value of the license and apply the same to their claims. It was further alleged that they had a party willing to take the license, if a transfer could be obtained, at \$1,000. The fund realized from the sale of the personal property by Summa had fully paid the rent claimed of Mrs. Breen, and the purchaser claimed to have purchased the right, title and interest of Summa in the license for \$2.

The court (Weidman, J.) directed the transfer of the license of Paul Summa to Mrs. Kate Breen, subject to the payment to the parties legally entitled thereto of a part of the license fee proportioned to the unexpired term of the current year.

After this order of the court a writ of certiorari to the Supreme Court was issued and filed. Then this rule to revoke the transfer of the license to Mrs. Breen was taken.

Opinion of the court by BECHTEL, J., May 1, 1893.

On March 27, 1893, the court, after a patient and full hearing, transferred the license of Paul Summa to Mrs. Kate Breen. Lewis Kline, for himself and others, has caused a writ of certiorari to issue and filed the same in this court on March 29, 1893. In effect, the above rule is taken to determine whether the writ is a supersedeas or not. We have heretofore expressed our doubts as to whether or not we should undertake to determine the effect of writs such as this. When the Common Pleas sends its writ to a justice to remove his record, it is not left to him to say whether he will obey it or whether he will execute the judgment he rendered. Why should the Common Pleas decide whether the writ of the Supreme Court supersedes its authority?

When the Supreme Court of the United States sent its writ to the Supreme Court of Pennsylvania in the case of *Penna. R. R. vs. Com.*, 39 Penna. St. R., 407, our Supreme Court declined to dispose

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of the question whether its process was stayed, and the parties were given time to apply to the Supreme Court of the United States for a supersedeas. Justice Woodward said: "I hold that the question of jurisdiction and the effect of these writs of error are questions for the Supreme Court of the United States." Justice Strong said: "I concur with the Chief Justice and Brother Thompson as to the effect of the writs of error from the Supreme Court of the United States, and I think it is for that court to enforce their own writs."

If, however, it will be of any advantage to the parties interested here to know our conclusion upon the question presented, and the reason therefor, they can have it. The granting of a license as it stood previous to the present act was entirely in the discretion of the Court of Quarter Sessions: *Toole's Appeal*, 90 Penna. St. R., 376. In *Raudenbusch's Case*, 120 Penna. St. R., 329, it is said in substance: "The granting or refusal of licenses under our present act is a matter of legal discretion, to be exercised wisely and not arbitrarily. To perform this duty the court below may hear petitions, remonstrances or witnesses, and, in some instances, act of its own knowledge, and this court will not review the manner in which such discretion is exercised.

But the present act says nothing in relation to the transfer of a license, and that is still governed by the act of April 20, 1858, Sec. 7, P. L. 366. It provides that "if the party licensed shall die, remove or cease to keep such house, his, her or their license may be transferred by the authority granting the same." The requisitions of the laws under this act permitted a certain discretion to the authority granting or refusing licenses, and this discretion is considerably enlarged by the act of 1887. While the court is required to hear and decide questions relating to the transfer of licenses, the higher court will not determine how we shall decide. Chief Justice Paxson says, in *Blumenthal's case*, after a full discussion of the subject: "The court below had the power, under the act of 1858, to transfer this license; but it was a matter of discretion and *not reviewable here*": *Petition of Babella Blumenthal*, 125 Penna. St. R., 416.

There is another serious difficulty in the way of the parties who obtained the above rule, as we stated at the time the order of transfer was made. Lewis Kline says the parties interested are creditors of Paul Summa, who disappeared, and this is the interest they have

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in this question. Mrs. Kate Breen, to whom the license was transferred, owns the property for which the license was granted, and, under the order of transfer, she is required to pay a proportionate share of the license fee to the parties legally entitled thereto. This does not seem to be satisfactory; but it appears there is a desire to demand more, for they assert no other interest than that of creditors. We are inclined to think that as creditors they have no interest in this question at all. This seems to be warranted from the following quotation from the opinion in the Blumenthal case: "While it is true, as was said in Raudenbusch's Case, 120 Penna. St. R., 328, that 'neither the petitioner nor any other person in this state has any property in the right to sell liquors,' yet it is also true that when the state grants a license to a man for that purpose the latter acquires a privilege to sell liquors for a specified time, for which he has paid the commonwealth a valuable consideration. The privilege, however, is *personal, and is not assignable, nor does it go to the personal representatives in case of death.*"

Under these circumstances, what interest or right has a creditor in the question whether or not the court shall transfer the license to another occupant of the house? If, as has been decided, we may transfer a license in a proper case, without the consent of the owner, to whom the privilege is personal, there would seem to be no reason why his creditors should have to be consulted.

Rule discharged.

Court of Common Pleas of Montgomery County.

SAMUEL D. HAWLEY VS. JOS. H. HAMPTON AND GEO. J. HUMBERT.

Where an execution is joint and the levy is on joint property, neither defendant can be allowed the benefit of the exemption law.

Where stock is assigned as collateral security for the payment of a debt, the debtor can not claim the benefit of the exemption laws out of the proceeds of the sale of the assigned property, as against the assignee.

MOTION to set aside appraisalment.

Childs & Evans, Esqs., for motion.

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Larzelere & Gibson, Esqs., contra.

Opinion of the court by WEAND, J., September 4, 1893.

The plaintiff is the holder of a note which reads as follows:

"Norristown, Pa., Dec. 1, 1892.

"Four months after date we or either of us promise to pay to the order of S. D. Hawley, at First National Bank of Norristown, Norristown, Pa., seven thousand dollars without defalcation, for value received, having deposited herewith (140) one hundred forty shares capital stock of the Norristown Steel Co. as collateral security, which we authorize the holder of this note, upon the non-performance of this promise at maturity, to sell either at the brokers' board or at public or private sale, without demanding payment of this note or of the debt due thereon, and without further notice, and apply proceeds, or as much thereof as may be necessary, to the payment of this note and all necessary expenses and charges, holding us responsible for any deficiency.

Joseph H. Hampton.

Geo. J. Humbert."

The certificate for the shares stood in the name of "Hampton & Humbert," and it was transferred in blank by "Hampton & Humbert," and was and is in custody of plaintiff. Judgment having been obtained upon the note a *fi. fa.* was issued, and under it the Sheriff levied upon the one hundred and forty shares of stock, whereupon each defendant made a claim for the benefit of the exemption laws, and the Sheriff had appraised and set apart to each defendant "one-half interest of one hundred and forty shares of the Norristown Steel Co., evidenced by Certificate No. 416, at \$2.50 per share."

The execution creditor now asks us to set aside said appraisement, because:

1. "The one hundred and forty shares, etc., being joint property of the defendants, is not subject to appraisement under the exemption."
2. "The share being pledged as collateral for a debt for which execution is issued, as appears by the record of said court, the same is not subject to an appraisement under the exemption."

The facts show that this was a joint note given for a joint debt. The certificate shows joint ownership in the stock, and it was assigned as such. Plaintiff, when he accepted the assignment, had a

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right to assume that the certificate spoke truly as to the ownership. Had he been informed otherwise he might not have been satisfied with the collateral. There being then a joint ownership in the stock the defendants can not claim the benefit of the exemption law. In fact, it is not capable of division within the meaning of the exemption laws. The appraisement gives each a one-half interest in the stock, which makes them again owners in common. It is not setting apart any specific property to either defendant. We are of opinion that the cases of *Bonsall vs. Comly*, 44 Penna. St. R., 442, and *Spade vs. Bruner*, 72 Penna. St. R., 57, are conclusive upon the subject, and that defendants were not entitled to the exemption.

We think the second exception must also be sustained.

This was not "property owned by or in possession of the debtor," for they had assigned their interest therein for the payment of the debt. The plaintiff had such property in the stock as that no other creditor of defendant could levy upon or sell it free from plaintiff's lien. Until his debt was paid he had the right to dispose of the stock and appropriate the proceeds toward the payment of the debt for which it was security.

The defendants could waive the benefit of the exemption law, and this they in effect did by their assignment. The act contemplates a case where a creditor attempts to deprive the debtor of his property against his will; but when the debtor voluntarily passes it over for the very purpose of paying or securing his debt, he has no standing to reclaim it. Otherwise, to secure a debt of \$50 a debtor would have to assign at least \$350 worth of property. The hardship to the debtor of such a rule shows its unreasonableness.

And now, September 4, 1893, the exceptions are sustained and the appraisements are set aside.

CHARLES HUNSICKER, ASSIGNEE OF THE NORRISTOWN TITLE, TRUST AND SAFE DEPOSIT CO., ASSIGNEE OF JOHN W. LOCH, vs. JOHN C. RICHARDSON, WITH NOTICE TO EMILY R. RICHARDSON AND ELLEN R. RICHARDSON, TERRE TENANTS.

Where a mortgagor has parted with his title to the mortgaged premises he will not be permitted to defend in a suit on the mortgage, if his defence is one for which he has an independent cause of action, and which will not be barred by a judgment on the sci. fa.

MOTION for judgment.

W. M. Dickinson, Esq., for plaintiff.

J. P. Hale Jenkins, Esq., for defendant, John C. Richardson.

Wanger & Knipe, Esqs., for terre tenants.

Opinion of the court by WEAND, J., September 4, 1893.

According to the record the defendant, mortgagor, has parted with his title to the mortgaged premises, and the terre tenants make no defence to the suit. Under these circumstances, even if it be conceded that he has a claim against plaintiff, what can the defendant gain by making it in this proceeding?

In those cases in which a mortgagor after he has parted with his title has been allowed to defend, it appeared that he would be liable on his bond in case the land was not of sufficient value to pay the debt; and as the judgment in the sci. fa. would be conclusive of the amount of the debt he could not afterwards defend as against a suit on the accompanying bond, and hence he was allowed to defend as against the mortgage: *Parker vs. Sulouff*, 94 Penna. St. R., 527; *Heckenstein vs. Love*, 98 Id., 518.

Where, however, he is relieved from any personal liability on the bond, he sustains no such relation to the property that he can gain or lose by the judgment in the case: *Reap vs. Battle*, 155 Penna. St. R., 265; *Bromall vs. Anderson*, 6 Cent. Rep., 723. And this is also the case where a judgment for the mortgage debt is not conclusive of the counter claim.

In this case a judgment on the mortgage will not conclude the defendant if he has a claim against plaintiff, for he is not bound to present it as an offset in this suit. And as he can bring his action against plaintiff if he has a claim for consequential damages, we are

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of opinion that he is not in a position to defend as against the mortgage.

And now, September 4, 1893, rule for judgment against defendant, John C. Richardson, made absolute, and judgment is directed to be entered as follows:

Principal of mortgage,	\$2,500 00
Attorney's commissions,	125 00
Interest at 5 ½ per cent. from Feb. 1, 1890, to date of suit,	
and at 6 per cent. since then,	495 83
	<hr/>
	\$3,120 83

Creditor on account of interest, viz.:

June 3, 1891,	\$68 75	
April 9, 1892,	50 00—	118 75
		<hr/>
		\$3,002 08

Court of Common Pleas of Luzerne County.

NESBITT VS. TURNER.

An admission by counsel for the defendant which was contrary to the facts of the case, and was a slip of the tongue, will not be treated with serious consideration.

Where it is apparent, upon the face of a bond, that an alteration in the date has been made, and no note of such alteration appears before execution, the question as to the time when the change was made must be found by the jury from the evidence in the case.

Where the defendant is sued as surety, alterations in the bond made without his knowledge and assent relieve him of liability.

A bond made by a married woman is absolutely void, and, in the absence of an entirely new consideration, can not be ratified so as to make it a valid obligation of the woman after the determination of her coverture by the death of her husband.

Mere acknowledgment of the genuineness of the signature does not amount to ratification.

Opinion of the court by **WOODWARD, J.**, May 22, 1893.

The appellant, as assignee of the Plymouth Savings Bank, brought this action against appellee upon a bond alleged to have been given by her to it, conditioned for the faithful performance of the duties of the cashier, W. W. Dietrick, her brother. In September, 1871, it appears, by the minutes of the savings bank, that the amount of the bond required to be given by its cashier for the faith-

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ful performance of his duties was fixed at twenty thousand dollars. No further action seems to have been taken by its Board of Directors until June 16, 1873, when the following entry appears upon its minutes: "The bond of cashier for twenty thousand dollars," followed by "was then signed by Mary Dietrick and Mrs. S. G. Turner." The words "was" and "then" were erased and the words "with proper corrections" interlined. So that it, as corrected, then read as follows: "The bond of the cashier for twenty thousand dollars, signed by Mary Dietrick and Mrs. S. G. Turner, with proper corrections, was read by the Vice President and taken in charge by him." This bond, upon which suit has been brought, upon examination, shows alterations. The words "28th February" are written over an erasure, and the figure 3 is written over 1 of the year 1871, and thus it is made to appear as if dated "February 28, 1873." In 1871 the appellee was the wife of S. G. Turner, who died subsequently in 1872. When the bond was offered in evidence by appellant an objection was made to it and sustained, because it showed, upon its face, alterations; but subsequently, on proof by a subscribing witness, it was admitted.

The first assignment of error relates to the action of the court in sustaining the objection in the first instance. As it was subsequently admitted, it would seem hardly necessary to consider this assignment of error: *Worall vs. Pile*, 132 Penna. St. R., 529. As this, however, is earnestly pressed by appellant, it may be proper to say that as the alteration in question cast a suspicion upon the instrument, the burden of proof was upon the appellant to explain them. In *Jordan vs. Stewart*, 23 Penna. St. R., 249, it is said: "But when a contest occurs, and the instrument is offered in evidence, the question at once arises whether the alteration is beneficial to the party offering it. If it be not, as in the instance of a bond or note altered to a less sum, the *prima facie* presumption is unchanged; if it be as was the case here, we do not presume a forgery, we hold the party offering it in evidence and seeking advantage from it is bound to explain the alteration to the satisfaction of a jury. The initiative and burden of proof are thrown upon him." In the case of *Hartley vs. Corboy*, 150 Penna. St. R., 28, the words in a promissory note were originally four months, and ninety days was written over them. Mr. Justice Green, in considering the cases upon the subject, said: "In these circumstances the case comes clearly within the operation

of all our decisions upon this class of cases, and it is at once manifest that when the note was offered in evidence without any explanation of the visible and material alterations it should have been promptly rejected." And following this he considers the cases upon this subject.

But the appellant contended that in the attestation clause the erasures are noted, because the witness wrote under his name February 28, 1873. This date of witnessing does not indicate in any manner a purpose to note erasures or alterations made before execution, and the copy filed, not showing evidences of alterations and erasures, thus misled the appellee and she filed no affidavit. The learned trial Judge, therefore, under these circumstances, was not guilty of error in requiring appellant to make proof of the execution of it. When this bond was actually signed does not appear by the proofs, but clearly must have been prior to the minute of the bank already referred to. The alteration of the words "was then signed," and the insertion of the words "with proper corrections," indicate that it was signed before that date. As there is no proof upon the subject, and as the paper originally bears date in 1871, and as it is not probable that a paper with no signature should be preserved from 1871 to 1873, there is a reasonable presumption that the paper was signed at the time of the original date of the instrument. But the learned trial Judge left it to the jury to find whether the date of the bond had been altered without appellee's knowledge or consent. By their verdict they have found that the date was 1871, and that it was altered without appellee's knowledge or assent. During 1871 the appellee's husband was alive, and this bond then executed by her as a surety was absolutely void. If thus absolutely void, a naked ratification by her after discoveriture did not make it binding upon her. If, therefore, in 1873, when discovered, she simply acknowledged her signature, it was not sufficient to make her liable upon it.

In *Brown vs. Bennett*, 75 Penna. St. R., 423, it was held that the receipt of an installment after discoveriture was, in fact, a redelivery of the instrument; but it was there said that a naked ratification, after discoveriture, would not avail, and that a mere admission of liability might not be sufficient. In *Buchanan vs. Hazard*, 95 Penna. St. R., 243, it was held that a married woman's deed is absolutely void, and that she can not be estopped by any subsequent act of ratification, and that nothing but a new deed subsequently acknowledged could

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avail. In Glidden vs. Strupler, 52 Penna. St. R., 403, it is said: "The contract to convey being absolutely void, because of incapacity, its ratification is equally forbidden unless by deed in the mode prescribed by the statute. No multiplication of deeds (and they are the most solemn acts *in pais* by which title can be transferred) will serve to ratify the void conveyance unless made according to the statutory direction. Much less can express ratification, by parol or expressions of satisfaction, infuse life into that which has no vitality. How then is it possible mere acts can be more efficacious than merely indicate the intention to transfer, which the writing has already expressed in terms explicit and emphatic? Acquiescence in, or acknowledgment of, the invalid act can not be invested with greater virtue than the deed itself by which the act was done. The policy of the law which denies the capacity to do the act as clearly denies the capacity to confirm it except in the legal mode."

It is, however, argued that Jordan vs. Jordan, 9 S. & R., 268, is an authority for ratification in this case. There the offer was made to prove that after the death of the husband she, the wife, had delivered the deed; and, as she had actually delivered the deed after discoverture, it was held to be error not to permit proof of the fact. It is clear that the scope of the proof was to show an actual delivery of the deed as her deed when she had become discovert. In the present case, while appellee was in the bank and standing behind the counter, she simply acknowledged her signature and nothing more; and therefore the case last referred to can not apply, as earnestly contended by appellant.

It is contended that on February 28, 1873, the bond was in fact reexecuted, and a redelivery of it then took place. If so redelivered, with alterations, and if she had at the time no knowledge of them, she can not be held liable. The learned trial Judge instructed the jury: "If you shall find, from an inspection of the bond, that these alterations were made, then the question arises, Were they made with the knowledge and assent of Mrs. Turner, the defendant? If not made in that way, she would be relieved of her liability on this bond as a surety for her brother." He thus left this to them as a question of fact to be determined by them. As the interlineations and erasures were questions of fact for the jury (Heffelfinger vs.

Shutz, 16 S. & R., 46), they have found, by their verdict, that they were made without her knowledge or assent; and if they were so made, clearly she can not be held to be liable upon this bond: *Miller vs. Gilleland*, 19 Penna. St. R., 123. When the principal party modifies his contract it is fatal to its validity as against the surety whose assent has not been obtained, even if it be for his benefit or if it do him no harm: *Bensinger vs. Wren*, 100 Penna. St. R., 505.

It has been argued that the bond in question was executed with the alterations and erasures, and delivered as such to the bank, and therefore the appellee is liable; but the evidence does not warrant this conclusion. The only witness upon this subject is Mr. Lance, who testified: "That he dropped in the bank on February 28, 1873; that appellee was in the bank behind the counter; that the cashier was also there; that the appellee did not sign it then, but she acknowledged her signature; that the cashier handed him the bond; that he was requested to mark the date of his witnessing it." There is no evidence, therefore, to show that the appellee knew that the date of the bond had been changed, or that any of the alterations had been made. She thus acknowledged her signature only, and the witness put his name to the paper with the date. If that bond, executed in 1871, during coverture, and therefore void, was intended by her to be executed, she being discovert, and redelivered to the bank, this evidence does not establish it. The learned Judge charged the jury: "If you find that it has not been altered in the manner alleged, if it was really signed not in 1871 but on February 28, 1873, you will then determine her liability." As the question of re-execution and redelivery was thus submitted to the jury, their verdict negatives this contention.

The evidence does not warrant the conclusion that although she signed the bond in 1871, she, in fact, executed it February 28, 1873, with knowledge of the alteration, nor that the obligors retained this bond from 1871 and delivered it to the bank in 1873 with its date rewritten February 28, 1873. The alternative contention that even if this bond was actually delivered to the bank in 1871, it was redelivered in 1873, the date being changed with her consent and knowledge, is not sustained by the evidence.

It is scarcely necessary to discuss the admission claimed to have been made by counsel for appellee. Its effect would necessarily have been fatal to her defence. It is, therefore, not possible that with this

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effect it could have been intended to be made. It would be a harsh rule to hold that the rights of parties might be swept away by admissions of counsel unintentionally made. The learned Judge was right, therefore, in treating the admission as unintentional, and the jury in regarding it in the same light.

Judgment affirmed.

Court of Common Pleas of Montgomery County.

LIPPINCOTT, SON & CO. VS. J. M. RITTENHOUSE.

Where there is no allegation of fraud, accident or mistake, the term of a judgment note will not be reformed or set aside.

RULE to open judgment. No. 147, June T., 1893.

Henry C. Boyer, Esq., for plaintiffs.

Edward E. Long, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., September 18, 1893.

The defendant admits the execution of the note, but claims that judgment was not to be entered upon it. He contends that the plaintiffs agreed to return the note or hold the same without entry in the Prothonotary's office. The plaintiffs allege that under the contract the note was not to be used if the defendant would by July 3d ship to plaintiffs' place of business sufficient merchandise to cover the amount of the note.

The parties submitted the testimony taken, as also certain affidavits which were read and offered without objection.

The note authorizes the plaintiffs to enter judgment upon it, and an agreement not to enter the note contradicts the very terms of the instrument. Such a condition destroys the writing for practical uses. There is no proof of fraud, accident or mistake in the execution of the writing. Under such circumstances we can not admit parol evidence to contradict the terms of the contract and strike down the written instrument.

What was the object of the note if the plaintiffs were not to use it? The defendant made an attempt to explain the purpose of the note, and his explanation proves the difficulty and instability of his position. He says, in reply to the question, "What was your understanding with reference to entering up the judgment, when given?" "That it was to be held in their office and satisfy their minds that in case anything happened in the way of my selling out my real estate, it was to be paid without making me this trouble of other claims."

But even if the evidence relating to this alleged parol contract is admissible, it fails to establish such contract. We must take the whole testimony, and from it we gather that the conduct of the defendant is entirely inconsistent with the claim he sets up. He failed to demand a return of the note when he found that the plaintiffs intended to use it in violation of the alleged agreement. After it was entered he did not accuse the plaintiffs of bad faith, but attempted to convince them that their entry of judgment was valueless because of the other liens of record. See letter of July 10, 1893. Immediately before its entry he sold his personal property under circumstances which indicate that he expected the plaintiffs to enter the note and issue execution.

We conclude that the record of the judgment should not be disturbed.

No doubt a collection fee of ten per centum can not be earned if the claim is paid before execution issues, or if an execution issues before a demand for the money is made.

And now, September 18, 1893, the rule to open the judgment is discharged.

AARON K. KULP VS. CATHARINE BRANDT.

A husband being indebted and wishing to obtain another loan induced his wife to assign a policy of life insurance in her favor to the creditor as collateral security. *Held*, that the creditor, not knowing what representation the husband had made to the wife, occupied the position of an innocent purchaser; and, as the contract was executed, the wife would not defeat the creditor's claim to the proceeds of the policy on the ground of misrepresentation by her husband.

The original indebtedness was evidenced by a note which was barred by lapse of time. The debtor gave instead a bond, dating it as of same date as note, which made it long overdue. *Held*, that this was not the taking of such new security or giving of time as would release a surety by requiring a return of the pledge.

Even although the creditor had no remedy on the note because of the statute of limitations, yet his right to the pledge still remained.

ISSUE. No. 5, June T., 1891.

Childs & Evans, Esqs., for plaintiff.

Wm. M. Goodman and Larzelere & Gibson, Esqs. for defendant.

Opinion of the court by WEAND, J., February 21, 1893.

Plaintiff brought suit against the Ætna Insurance Company on a policy of insurance issued on the life of Nathan R. Brandt for the use of his wife, Catharine Brandt, and assigned to plaintiff as collateral for an indebtedness of Nathan R. Brandt.

A dispute having arisen between the plaintiff and Mrs. Brandt as to the amount of plaintiff's claim, the defendant company was allowed to pay the fund into court, and Mrs. Brandt was permitted to interplead. An issue was framed to determine how much of the fund was due the plaintiff. The parties also agreed to refer the matter to the court without the intervention of a jury; and it was further agreed that plaintiff and Mrs. Brandt should be allowed to testify as though Mr. Brandt was still living.

FINDING OF FACTS.

The Ætna Life Insurance Company issued its policy, No. 54,593, dated September 2, 1868, insuring the life of Nathan R. Brandt, for the use of his wife, Catharine Brandt, to the amount of \$2,000.

On the 2d day of August, 1876, Nathan R. and Catharine Brandt assigned this policy to Aaron K. Kulp "as collateral to the extent of such interest as he may have when said policy becomes a claim." The consideration for this assignment was an indebtedness from Nathan R. Brandt to said Kulp.

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Kulp vs. Brandt.

Nathan R. Brandt died July 10, 1890.

Kulp paid the premiums on the policy from 1876 to 1882 inclusive, aggregating \$364.26. He received dividends from 1883 to 1889 inclusive, amounting to \$128.88.

At the time of the death of Nathan R. Brandt, the plaintiff held his bond for \$1,220.29, with interest, dated August 2, 1876, at one year. Prior to August 2, 1876, the deceased owed plaintiff \$684.29, and on that day received as a further loan \$536 additional, making \$1,220.29. This latter loan was advanced in consideration of the assignment of the policy as security for the whole indebtedness. As evidence of the amount due, Brandt gave Kulp his due bill, which the latter held until 1883, when he demanded a new obligation to avoid a possible plea of the statute of limitations. Brandt then gave the bond referred to, and by agreement it was dated the same date as the due bill had been. The due bill was then surrendered to Brandt.

Mrs. Brandt was not aware that her husband had given a note to Kulp, nor did she know of the substitution of the bond. She did not know how much her husband owed Kulp, and the latter never had any communication with her upon the subject until 1883, when he received an order from Mr. Brandt to draw the dividends. Kulp had no knowledge of any representations made by Brandt to his wife to induce her to execute the assignment, and there is no competent evidence that any were made. The money having been paid into court, it was agreed that Kulp was entitled to receive \$1,363.76, and that he should be allowed to take out of court \$1,300, and the contest, therefore, is only over the balance. The court, in pursuance of the agreement of the parties, made an order for the payment to Kulp of \$1,300, June 19, 1891.

Principal of Brandt's indebtedness is	-	-	\$1,220 29
Premiums paid by Kulp	-	-	364 26
Interest to June 19, 1891, date of payment of \$1,300			1,175 57
			<hr/>
			\$2,760 12
Kulp received dividends	-	-	\$128 88
Interest	-	-	36 34
Money taken out of court	-	-	1,300 00—1,465 22
			<hr/>
Balance due with interest from June 19, 1891	-		\$1,294 90

Kulp vs. Brandt.

But no interest to be allowed out of the fund in court unless it drew interest.

CONCLUSIONS OF LAW.

The defendant, Mrs. Brandt, contends:

- 1st. That she was deceived by her husband into making the assignment.
- 2d. That the assignment was invalid as against her.
- 3d. That the substitution of the bond for the note released her as surety.

As we have already stated, we can find no evidence of fraud to affect the plaintiff. There is no evidence to show that Brandt misrepresented matters to his wife, or that she executed the assignment by reason of any fraudulent representations. Even though such might have been the case so far as her husband was concerned, Kulp was no party to it, nor did he have knowledge of any facts to put him upon inquiry. He stands in the light of an innocent purchaser for value without notice. Mrs. Brandt agrees that Brandt is entitled to recover everything due him up to the time of the transfer of the policy, and for the balance of his claim there was a new consideration. This was an executed contract to which Kulp was a party. Mrs. B., by executing the transfer, placed it in the power of her husband to obtain the loan, and she can not now avoid the effect of it by any fact before us.

That a wife can assign, transfer and pledge her personal property for her own debt or that of her husband, is well established: *Powell's Appeal*, 98 Penna. St. R., 403; *Dando's Appeal*, 94 Id., 76; *Bond vs. Bunting*, 78 Id., 210; *Brown's Appeal*, 9 W. N. C., 329.

The taking of the bond in place of the note does not affect the relative rights of the parties. It was done under a misapprehension of the law governing the case. Although the note might have been outlawed and no recovery had thereon, still the pledge or assignment remained in full force: *Evans vs. See*, 23 Penna. St. R., 88; *Shaw vs. Silloway*, 145 Mass., 503; *Hancock vs. Ins. Co.*, 114 Id., 155; *Belknap vs. Gleason*, 11 Conn., 160; *Acheson vs. Shenk*, 2 Leg. Gaz., 361. This being the case, the status of the parties was not changed. It gave Kulp no new cause of action for the debt as previously shown by the note; it gave Brandt no extension of time, for the bond, according to its terms, was long overdue when given.

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The position of neither party was changed except that Brandt had declined to place himself in the position whereby a plea of the statute could be made to the note. Even if Mrs. Brandt's contention is correct—that she occupies the position of a surety—then, as the note was barred, plaintiff could not recover on it, but must look to his pledge. Taking the bond, therefore, was not extending the time of payment, but merely a recognition of the debt by Brandt: *Remsen vs. Graves*, 41 N. Y. (2 Hand), 471; *Sizer vs. Heacock*, 23 Wend., 81. It is not the ordinary case of a creditor tying his hands whereby neither he nor a surety can pursue the principal.

The mere taking of promissory notes by a creditor from a debtor does not of itself create a legal presumption that they were taken in satisfaction of a previously existing indebtedness, nor establish an agreement to give further time for payment of said indebtedness whereby a surety will be discharged: *Hutchinson vs. Hoodwell*, 107 Penna. St. R., 509.

We therefore find that in addition to the amount admitted on record to be due plaintiff and drawn out of court, viz., \$1,300, there is still due plaintiff \$1,294.90 with interest from June 19, 1891, and that this amount shall be paid to him out of the fund in court, or so much thereof as may still be in court, less costs; and direct that notice of the filing of this award and finding shall be forthwith given by the Prothonotary to the parties or their attorneys; and if no exceptions thereto are filed in the Prothonotary's office within twenty days after service of such notice, judgment shall be entered thereon by the Prothonotary.

September 18, 1893, exceptions are overruled and judgment is directed to be entered as per award.

DANIEL KANE VS. A. H. MOORE.

The motive of the master in discharging a servant is an immaterial issue. The sole question is whether a legal cause existed at the time of the dismissal.

An adequate cause of the dismissal of an employe existing and known to the employer at the time, excuses and justifies the discharge though it may not have been specially assigned at the time; and the assignment of one cause will not estop the master from showing another adequate cause known to him at the time of the discharge.

RULE for judgment for want of a sufficient affidavit of defence.
No. 41, March T., 1893.

Larzelere & Gibson, Esqs., for plaintiff.

Charles Hunsicker, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., October 2, 1893.

The defendant employed the plaintiff as a horse trainer to serve from May 1, 1892, until January 1, 1893. On October 15, 1892, the plaintiff was discharged. In his statement he alleges there was no justification for his discharge, and he claims wages for the balance of the term of his employment.

The defendant in his affidavit alleges unfaithfulness and incompetency as the grounds for the discharge. He also contends that the plaintiff "made no application for employment," and that "he could have secured a place had he made application."

According to the plaintiff's statement the defendant by letter, on August 12, 1892, declared: "I am under such an expense that I find it necessary to reduce my expenses for this fall. Should I do so I may not want you after September. In doing so it is not that I am displeased, but I find that Mr. Cue and yourself can not both be kept busy with the stock I have, and am paying out so much that I feel I should try and save some."

The defendant answers that this letter was written because he "did not want to injure the plaintiff's chances of securing work elsewhere."

The letter of August 12th was written more than two months before the actual discharge was given.

The motive of the master in discharging the servant is not the issue, nor is it material. The simple question is whether a legal cause existed for such discharge. And in *Wood on Master and Servant*, page 228, it is held that the discharge is good although the sufficient ground for discharge was not known to the master at the time of the discharge. "The master is not bound to give any reason for the dismissal, at the time of the discharge; and, if he does, he

Kane vs. Moore.

is not thereby estopped from setting up any other or different cause which really existed when the servant was discharged": Wood, Sec. 119, and authorities there cited. If this proposition may be too general, we think it is clearly established that an adequate cause for the dismissal of an employe existing and *known* to the employer at the time of such dismissal, excuses and justifies the discharge though it may not have been specially assigned at the time.

If want of business be assigned, the employer is not estopped from showing other adequate cause: Strausse vs. Meertief, 6 Ala., 299.

The defendant in the case before us contends that he had knowledge of the incompetency at the time of discharge. His declaration that he concealed the fact in the letter of August 12th, for the benefit of the plaintiff, shows he had such knowledge.

Whether the statement in the defendant's letter of August 12th, that he "was not displeased" with the plaintiff, should estop him from setting up the incompetency and other charges in his affidavit of defence, is a matter that can be best determined upon the trial of the case. It is a question of evidence. If the plaintiff for his own benefit induced the defendant to write such letter, it ought not to prejudice the defendant's case. But we do not wish to be understood as passing upon the question at this stage of the proceeding.

If the plaintiff was incompetent and unfaithful, the discharge was proper. When the plaintiff hired himself as a horse trainer, there was an implied contract that he possessed the necessary qualifications to discharge the duties of the position with reasonable skill. It is true he was employed on the stock farm before the term of hiring began; but he was in the service of the chief trainer, not in the employ of the defendant. As an assistant trainer the master may not have had proper opportunities to judge of his skill necessary to fill the position of chief trainer.

The allegation that plaintiff could have had other employment after his discharge is a good defence, but only so far as it goes in mitigation of damages. We are not informed how much he would have earned in such employment. This allegation may be true, and yet the plaintiff may be entitled to a judgment for part of his claim. If the defendant wishes to reduce the damages, he must give us facts from which such reduction can be ascertained. As the other ground of defence is sufficient in our opinion to prevent judgment, the rule is discharged.

THE DIRECTORS OF THE POOR AND OF THE HOUSE OF EMPLOYMENT
FOR THE COUNTY OF MONTGOMERY VS. SAMUEL E. NYCE, COM-
MITTEE OF EDWARD MALONE, A LUNATIC.

The directors of the poor are entitled to be reimbursed out of the after acquired property of a pauper, although such pauper was without any estate at the time he was furnished maintenance at the alms-house and at the hospital for the insane. The recovery is limited to the supplies furnished within six years where the committee pleads the statute of limitations.

CASE stated. No. 155, March T., 1892.

James B. Holland and *Edward F. Kane, Esqs.*, for plaintiff.

Henry Freedley, Jr., Esq., for defendant.

Opinion of the court by SWARTZ, P. J., October 2, 1893.

Edward Malone was admitted to the Montgomery county alms-house in 1877. In 1888 he became insane and was transferred to the hospital for the insane at Norristown. Under the will of Jane Malone, his sister, a legacy of thirty-one hundred dollars came into the hands of the committee of the lunatic. Jane Malone died in June, 1891. Since June 7, 1891, the lunatic was maintained at the hospital out of his own estate.

The plaintiff claims the right to be reimbursed out of the money in the committee's hands for past maintenance at the alms-house and hospital. Is the after acquired property liable for the previous maintenance? Edward Malone, the inmate and patient, was without any means prior to June, 1891.

Numerous authorities may be cited to show that at common law supplies furnished to a pauper are gratuities, for the payment of which no promise is implied: *Deer Isle vs. Eaton*, 12 Mass., 338; *Stow vs. Sawyer*, 3 Allen, 515; *Kennebunkport vs. Smith*, 22 Me., 445; *City of Albany vs. McNamara*, 117 N. Y., 168; *Benson vs. Hitchcock*, 37 Vt., 567; *Charlestown vs. Hubbard*, 9 N. H., 195.

It is true where one voluntarily furnishes food to another the contractual relationship of debtor and creditor does not arise. Whether this principle should have any application where the supplies must be furnished upon the demand of the pauper, is not so clear. Why should the recipient of the supplies under such circumstances escape payment when in funds? If he is compelled to pay, he simply does that which in good morals he ought to do voluntarily. His payment enables the county to enlarge its liberality in other needy cases. It is said that such repayment is in conflict with the policy of our poor

laws and our ideas of charity. But it seems to us there is something radically wrong with the theory that a patient may leave an institution with a large estate of his own in his pocket, without any legal obligation resting upon him to pay for the food he consumed. Such treatment of the patient is not calculated to stimulate his honesty or improve his citizenship. Nor does the demand for reimbursement under such circumstances detract from the charity. If the pauper receives the maintenance upon the condition that he shall pay when able, it answers his needs just as much as if there were no obligation to pay under any conditions.

Whether there is any obligation to pay without a statute creating the liability, is immaterial, for our act of 1836, by Sec. 33, fixes the obligation to pay. The act declares: "It shall be lawful for the directors of the poor of any county, and for the overseers of any district, as the case may be, in which any person shall have become chargeable, to sue for and recover any real and personal estate belonging to such person, and to sell or otherwise dispose of the personal property, and to collect and receive the rents and profits of the real estate, and to apply the proceeds, or so much thereof as may be necessary, to defray the expenses incurred in the support and funeral of such person."

If this act does not cover the case before us, it is difficult to see the purpose of the enactment. The man who has an estate sufficient to provide for his maintenance at the time he makes application for charity, is not in fact a pauper, and the authorities are not obliged to furnish the support. If he gain admission through false statements, his estate is liable without any statutory provision: *Stow vs. Sawyer*, 3 Allen, 515, and 117 N. Y., *supra*. There are, no doubt, cases of emergency where it is the duty of the authorities to furnish aid before there is any opportunity to inquire into the condition of the man's estate; but it can not be that the act was intended to protect the county against these exceptional cases alone.

The act declares that the directors of the poor may take the estate *to defray the expenses incurred*; they are not limited to the expenses which may be incurred in the future. Nor is there anything in the act limiting them to the property which the pauper had *at the time the expenses were incurred*. The act seems to contemplate a case similar to the one before us. The "person shall have become chargeable"—that is, he was chargeable at the time he was admitted

Poor Directors, &c., vs. Nyce, &c.

because he had no estate. The estate is to be applied to expenses incurred; not the estate he had when the supplies were furnished, because then he had no estate at all, and by reason of that fact became a charge.

An act was passed in Massachusetts on February 24, 1818, wherein it was provided that "the inhabitants of any town or district within this commonwealth, who have incurred expenses for the support of any pauper, whether he was legally chargeable to them by means of his settlement or not, may recover the same against such person, his executors or administrators, in an action of assumpsit, for money paid, laid out and expended for his use." Under this law the pauper was liable, and it does not appear that any exception was made in his behalf if he happened to be without estate at the time the relief was furnished: *Groveland vs. Medford*, 1 Allen, 23; *Medford vs. Larned*, 12 Mass., 215. Our act is as broad as the law just cited. It is true under our law the directors of the poor can only sue for the property which belongs to the person chargeable; but the power to sue where there is no property is of little value.

Under the law the poor district has a direct recourse to the relatives bound to maintain the pauper: *Wertz vs. Blair County*, 66 Penna. St. R., 18. And where, in such case, suit is brought for past maintenance, the present ability of the relative to pay seems to be the limit of the inquiry. We know of no case where the ability to pay at the time the relief was furnished was made the test of liability. It would certainly be a hardship to relieve the person under such circumstances who received the aid and compel the relative to pay who may be less able at the time than the pauper himself.

The act of 1836, so far as it provides for the reimbursement of the poor directors, is a remedial statute, and should therefore receive a liberal construction. We are satisfied that under it the plaintiffs are entitled to recover from the committee for the support furnished at the alms-house.

The act of April 8, 1861, P. L. 249, gives the directors of the poor the right to recover the moneys expended at the insane hospital. The estate of the pauper is liable to the extent of its liability under the poor laws: *Lower Augusta Township vs. Northumberland Co.*, 37 Penna. St. R., 143; *Wertz vs. Blair Co.*, *supra*.

The defendant pleaded the statute of limitations; the recovery must therefore be limited to the money expended within six years immediately prior to the bringing of this suit. The latter date is not set forth in the case stated. Counsel will make the computation, submit the same to the court, and judgment will be entered for the sum with costs in favor of the plaintiff.

LILLY & BUTLER VS. GEO. W. EVANS.

An affidavit of defence is insufficient if it avers no more than payment of all that the defendant ever owed. The affidavit should set out with a reasonable degree of particularity the payments and when and how they were made.

RULE for judgment for want of a sufficient affidavit of defence.
No. 160, June T., 1892.

Wm. F. Solly, Esq., for plaintiff.

Geo. N. Corson, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., September 18, 1893.

The defendant in his affidavit says: "I paid plaintiffs for everything I ever bought of them, and do not owe them one cent." This is not a sufficient affidavit; it amounts to no more than a plea of payment with leave, and such plea can not take the place of an affidavit: *Snyder vs. Powers*, 37 Leg. Int., 387; *McCracken vs. Congregation*, 111 Penna. St. R., 109; *Hiestand vs. Williams*, 128 Id., 131.

If the claim was paid, the defendant can certainly give us some light as to the amount paid, or as to the times and circumstances under which the payment was made. He does not even admit that he purchased the goods set forth in the plaintiff's statement. He declares he paid for everything he bought; but under this declaration he may wish to dispute the purchases themselves.

And now, September 18, 1893, the rule for judgment is made absolute.

IN RE JOHN C. MERCER HOME.

Where real estate is devised to a charity, the deed to be made by the executor to a corporation formed to administer the trust, an application for the sale of part of the land so devised under the act of April 18, 1853, must be made in the Orphans' Court.

Where the devise is a gift of land from motives of charity and not a dedication of land to charitable uses, and there is no prohibition of alienation, the land may be sold under the act of 1853 upon good cause shown.

EXCEPTIONS to report of auditor. No. 7, June T., 1893.

B. E. Chain, Esq., for application.

Geo. W. Rogers, Esq., contra.

Opinion of the court by SWARTZ, P. J., October 2, 1893.

The auditor finds in favor of the application. His well considered report is self-sustaining. We are satisfied that it is the duty of the court to lend its aid in the consummation of the sale.

There is nothing in the will of Ann Jane Mercer clearly indicating an intention to restrain alienation. In the absence of such intent the law will not tolerate the imposition of a condition against alienation.

The purposes of the charity do not demand that the one hundred and eighty-five acres of land should remain intact. The twelve disabled clergymen do not need them as a *home*. How can the scattered farm buildings and dilapidated mill add to the comfort of the inmates of the mansion-house? They are helpful to the charity only so far as they produce revenue.

Counsel for the exceptant contends that the use of the word "home" indicates an intent to dedicate perpetually the land itself. But, as already shown, such intent can not be inferred from the use of the word, when we consider the extent, character, situation and improvements of the land.

There is no prohibition against alienation; on the contrary, there is an implied permission clearly expressed to sell for the use and purpose of the Home. That such sale for the use of the charity may be carried out, the land is granted to the corporation, its successors and *assigns*.

The direction to convey the real and personal property to the corporation, "to be used and occupied solely for a home," if it stood by itself, might be considered a condition against alienation, but it

ought not to outweigh the prior permission to sell for the use of the Home. If the testatrix intended to forbid alienation, she failed to clearly express such intent. We can, we think, give full effect to her will by treating the bequest as "a gift of land from motives of charity," and not "a dedication of land to charitable uses": *Griffitts vs. Cope*, 17 Penna. St. R., 96.

We are of opinion that the corporation acquired the real estate by last will. The proceedings should therefore be entitled in the Orphans' Court. It is true there was a deed from the residuary devisee; but, if we are correct in our interpretation of the will, the corporation took nothing by this deed. The grantor had nothing to convey. The auditor finds that under the will of Mrs. Mercer the corporation acquired an absolute fee simple title. If this be so, then the deed of the residuary devisee added nothing to the estate already acquired. Nor do we see how the deed, by the direction of the testatrix to the corporation, can be said to constitute an estate derived partly by deed. This deed shows upon its face that the estate granted is acquired through the will. The deed did not enlarge the estate. It may be said the title came through this trustee, but the act of April 27, 1855, P. L. 369, does not speak of title; but the test is, from what source was the *estate derived*?

The first exception is therefore sustained. This, however, is a matter of small moment, as the parties are willing to have the proceedings certified to the Orphans' Court. The only real controversy before us relates to the power of the court to order the sale.

The other exceptions are dismissed and the decree submitted is approved.

The Prothonotary will certify the entire proceedings to the Orphans' Court, to the end that the proper record may be made and preserved in said office.

THE BOROUGH OF JENKINTOWN VS. FRANK FIRMSTONE AND HARRY FIRMSTONE, EXECUTORS OF SUSAN KIMBER, DEC'D, MARY ELIZABETH FIRMSTONE AND PHILIP SPAETER, OWNERS OR REPUTED OWNERS.

Where the materials and work in the paving of a side-walk were furnished continuously, each item as part of an entire piece of work contemplated and undertaken when the street commissioner began the work, the lien is in time if filed within thirty days after the expense of the whole work was incurred.

The law governing the paving of streets does not apply to foot-walks. That the foot-rule assessment in paving streets does not apply to rural property, is therefore immaterial.

Where the borough authorities direct an owner to pave a side-walk the courts can not interfere unless there is a clear abuse of the discretion vested in the municipal authority.

Under what circumstances the borough may do the paving of the side-walk in sections and file a lien for the part actually completed.

MOTION and reasons for a new trial. No. 7, March T., 1892.

J. B. Larzelere, Jr., and Edward F. Kane, Esqs., for plaintiff.

Joseph Fornance, Esq., for executors and Mary Elizabeth Firmstone.

Charles Davis, Esq., for Philip Spaeter.

Opinion of the court by SWARTZ, P. J., October 2, 1893.

Upon the trial of the case but two questions were raised by the defendants. First, was the claim filed in time for the work done prior to August 30, 1891? And secondly, can the plaintiff recover if the jury find that the curbing and paving was done in front of rural property?

Whether the claim was filed within thirty days after the expense had been incurred, was, under the evidence, a question of fact. This matter was carefully submitted to the jury. The verdict shows that the materials and work were furnished continuously, each item as a part of an entire piece of work contemplated and undertaken when the street commissioner began the paving. Under such finding the lien was in time: *Singerly vs. Doerr*, 62 Penna. St. R., 9; *Hofer's Appeal*, 116 Id., 360.

We are not convinced that there was any error in our answer to the defendant's fourth point.

The construction of a proper foot or side-walk in a borough

differs from the ordinary work necessary to pave the carriage way of the street. The general borough act of April 3, 1851, provides for the former work and its payment by the abutting owners; but there is no provision under this act for the latter work. It is made the duty of the borough authorities to require and direct the paving of the side-walk. This supervision is in the nature of a police regulation.

The act makes no exception for rural property. Such property may require a foot-walk just as much as any other property in the borough. The case before us furnishes a good illustration. The property fronts on one of the principal highways in the borough, leading to the railway depot. The travel on the side-walk is necessarily very extensive. Both below and above the defendant's property a paved side-walk is constructed. A tract of forty-two acres having a market value of fifteen hundred dollars per acre can hardly be called farm land.

Under the act of 1851 we can not interfere with the borough authorities unless there is a clear abuse of the discretion vested in them. There is no evidence before us of such abuse. The argument that the foot-rule assessment can not be applied to the paving of rural property does not help the defendant's case, for the law governing the paving of streets has no application to foot-walks. *Findley vs. Pittsburg*, 10 Cent. R., 328, as we read it, disposes of the defendant's entire argument on this branch of the controversy. We will cite the whole opinion. "It is a mistake to suppose that the law governing the paving of streets applies to foot-walks. The owner of the latter, on notice of the street commissioner, is bound to pave it or submit to have it paved for him by the contract of that officer. Nor is the commissioner obliged to advertise for bids, in the absence of any law or ordinance specially requiring him to do so, for such an act would subserve no good purpose. The whole matter concerns the individual owner and not the public. He may and ought to do it himself; but if he neglects or refuses so to do, and it is done for him, still he has the right to defend both as to the price and quality of the work. This is all the defendant in this case could fairly ask; and as these grounds of defence were open to him, he is without just cause of complaint." In the case cited the work of paving the side-walk was done by the city of Pittsburg under an act approved April 18, 1857, P. L. 240. The powers given to the bor-

Borough of Jenkintown vs. Firmstone et al.

ough of Jenkintown under the general borough act are coëxtensive with those given to the city of Pittsburg under the act of 1857.

Upon the argument on the motion for a new trial the defendants for the first time interpose an additional answer to the plaintiff's claim. They contend there should have been no recovery on the lien because the plaintiff failed to pave the side-walk along the entire front of defendants' property, although the ordinance and notice to defendants required such paving along the entire front of the property on Greenwood avenue. The ordinance as well as the notice to the defendants provided for paving some sixteen hundred feet. The borough authorities, when they found the defendants refused or neglected to do the paving, ordered one hundred and seventy and eleventh-twelfths feet to be paved by the street commissioner. Must the borough pave the entire sixteen hundred feet before they can recover the expense from the defendants?

We find no merit in this objection to the lien. If the defendants are honest in their belief that they are not legally liable to pay for the paving of the side-walk, then the present method of ascertaining their liability is commendable. If they are liable in law, then instead of being compelled to pay a penalty of twenty per centum for the entire work they may escape by the payment of a much smaller sum. That is, when their liability is determined they can finish the work themselves and save the penalty as to the balance of the paving. If, on the other hand, they do not dispute their liability to pave the side-walk, the remedy is in their own hands; if the work does not progress rapidly enough under the direction of the borough, they can take the matter in hand and have the work done.

While the objection has no merit in fact, still the borough can not recover if the defence is well founded in law. The defendants contend that the commencement of the work by the borough constituted an entire contract to do the paving of the sixteen hundred feet. All that the borough did was to commence the work the defendants failed to do. There was no obligation upon them to do the whole work at once. The need for part of the work may have been urgent. It may be that the need for the balance of the pavement was not as great as the demand for immediate improvements at the hands of the street commissioner in other parts of the town. The finances of the borough may have been insufficient to do the whole paving along the defendant's property at the time. When the act of 1851 gave

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to the borough the right to construct paved side-walks, it gave at the same time the subordinate powers necessary to exercise the right. If the borough authorities were to cut up the work in small parts, and file numerous liens as each successive part is completed, the court can always interfere to protect the property owner.

It may be that the plaintiff by the present proceeding has placed an obstacle in their way for a recovery upon liens they may file for subsequent work: *Schenley vs. City of Allegheny*, 36 Penna. St. R., 60. We are of opinion that the exception should not prevail against the present lien.

And now, October 2, 1893, the exceptions are dismissed and the new trial is refused.

Orphans' Court of Montgomery County.

ESTATE OF WM. T. HUGHES, DEC'D.

A bequest by a father to his daughter of his personal estate "during her life-time, and absolutely should she leave issue at her decease; otherwise I give and bequeath one-half of the unexpended balance of the bequests to her by me herein made to my son C. and his legal representatives after her decease, she to have the sole benefit and control thereof during her life-time, with full privilege and authority to dispose of the remaining one-half of the unexpended portion of the bequests to her aforesaid in such manner as she may deem proper." *Heid*, that the legatee was entitled to the absolute use of the fund during her life time without security.

EXCEPTIONS to auditor's report.

Larzelere & Gibson and *J. V. Gotwalts, Esqs.*, for exceptions.

Opinion of the court by *WEAND, J.*, October 2, 1893.

The testator bequeathed his personal estate to his daughter Mary "during her life-time, and absolutely should she leave issue at her decease; otherwise I give and bequeath one-half of the unexpended balance of the bequests to her by me herein made to my son Charles Y. Hughes and his legal representatives after her decease, she to have the sole benefit and control thereof during her life-time,

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with full privilege and authority to dispose of the remaining one-half of the unexpended portion of the bequests to her aforesaid in such manner as she may deem proper."

This language together with all the facts and circumstances show that he intended Mary to have the absolute use of the fund during her life-time, and it was only the "unexpended balance" or "portion," if she should die without leaving issue surviving her, in which Charles would be interested.

There would be no force in the words "unexpended balance" and "unexpended portion" if testator meant that only the income was to be used by the legatee. If Mary died leaving issue, such issue took the balance. The words used in this will are as effectual to show an intent that the legatee should take the personal estate absolutely if she required it as was the language used in Markley's Estate, 132 Penna. St. R., 352; Gold's Estate, 133 Id., 495; Weppenstall's Estate, 144 Id., 259; Hambright's Appeal, 2 Grant, 320. In the latter case the provision was that the wife should have \$3,000 "for her full use during her life-time; and at her death, if any left, I desire the one-half to go to my brother," etc., and it was construed to mean that the widow was to have the fund without security, and that as there might be nothing left to go to the other heirs there could be nothing to secure by a bond. In this case, as she was to have the "sole benefit and control thereof during her life-time," we can not restrict her use of it by requiring security or investment, for this would be to limit her discretion.

Exception is taken to the form of the auditor's decree. He might have contented himself with simply awarding the fund to the legatee; but, instead, he has added his construction of the terms of the will. We can not see how this can prejudice her, for she is not by the decree in any way restricted in the use of the fund different from the terms of the bequest.

And now, October 2, 1893, the exceptions to the report of the auditor are overruled and the report is confirmed.

Supreme Court of Pennsylvania.

SOUDER'S APPEAL.

The owner of stock of a corporation, having placed all the *indicia* of ownership in another person, will not be permitted to deny the title of the vendee for value of that person without notice of the owner's rights.

A certificate of stock together with an assignment thereof in blank and an irrevocable power of attorney to transfer the same is, in the hands of a third party without notice and for value, evidence of ownership that can not be successfully attacked.

The fact that the assignment and power of attorney was signed by a married woman does not put said third party on inquiry where her husband's name appears as a witness to her signatures.

The signature of a husband as a witness to an assignment of stock by his wife is sufficient evidence of his consent to said assignment, and parol testimony is superfluous to establish or to contradict it.

The fact that the ownership established by the *indicia* of title possessed by the holders dated nearly two years previous to the loan can not be said to be either a ground of suspicion or a cause for inquiry, but rather confirms the title of the holders because indicative of unquestioned ownership and an acquiescence in the same during that time.

The plaintiff, a married woman, holding in her own name a certificate of two hundred and twenty-eight shares of bank stock, lent it to D. for sixty days, he giving as a memorandum therefor a note of S. & D. Accompanying said stock loaned was a separate assignment and power of attorney signed by her and partly filled up and witnessed by her husband, who also filled up the note, although he had objected to the transaction. The stock was not returned to the plaintiff, and was pledged two years afterwards by S. & D. to the defendant as collateral security for a loan. The plaintiff received dividends on the stock until S. & D. made an assignment for the benefit of creditors, shortly before which she, for the first time becoming aware of the said pledging of her stock, notified the bank not to transfer the stock on the books to the defendant, and brought suit to recover it. *Held*, that the assent of the husband was sufficiently manifested by his name appearing on the papers, that the papers showed all the *indicia* of ownership in S. & D., and the defendant bank was not put upon inquiry and was a *bona fide* holder for value, and the bill should therefore be dismissed.

APPEAL of Mary E. Souder from the decree of the Court of Common Pleas of Lancaster county in dismissing plaintiff's bill in the equity suit of Mary E. Souder and William H. Souder, her husband, vs. The Columbia National Bank, The York National Bank, and Edward Chapin, assignee for the benefit of creditors of Schall & Danner.

On March 25, 1886, James M. Danner, of the firm of Schall & Danner, borrowed for sixty days from his sister, Mary E. Souder, the appellant, two hundred and twenty-eight shares of stock of the York National Bank, giving to her as a memorandum a note of Schall & Danner for \$11,000.

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Mrs. Souder's husband was present at this transaction, and, although objecting to it, he drew up the note, filled in the writing in the power of attorney to transfer signed by his wife, and witnessed her signature thereon and on a separate assignment of the stock.

Mr. Danner did not return the stock in sixty days, but pledged it as collateral security to the Columbia National Bank for a loan, and subsequently, on March 25, 1891, Schall & Danner made an assignment for the benefit of creditors.

Mrs. Souder first learned that this stock was in the hands of the Columbia National Bank a few weeks before this assignment, and immediately notified the York National Bank not to make a transfer of the stock. Mr. and Mrs. Souder, when requested by Cashier Jansen, of the Columbia National Bank, both refused to sign a transfer of the stock on the books of the York National Bank.

On the 15th day of December, 1891, this bill was filed, praying for a decree that said certificate of stock be restored to the plaintiff. George Nauman, Esq., was appointed examiner and master. On May 2, 1893, the master recommended that the plaintiff's bill be dismissed. On exceptions filed the court, Livingston, J., decreed that this bill stand dismissed, and ordered the plaintiff to pay the defendants their proper costs. Thereupon the plaintiff took this appeal, assigning for error the above action of the court.

E. W. Spangler and Brown & Hensel, Esqs., for appellant.

H. M. North, Esq., for appellee.

Opinion of the court by THOMPSON, J., July 19, 1893.

The formation of stock companies in the last half century has led to a gigantic development of manufacturing, mining and transporting interests. The trend of judicial decisions in regard to the millions of dollars represented by certificates of stock issued by them is for public convenience, towards a facility in making their sale and transfer, and the avoidance of that which would tend to hamper the same. While they are not in form or effect negotiable, yet they are for the purpose of sale and transfer given an approximate character. A certificate with an assignment in blank, with an irrevocable power of attorney executed, is, when held by a third party, evidence of ownership, whose title was based upon value and without notice of intervening rights, can not be successfully attacked. In the stock market numbers of certificates pass constantly from sellers to pur-

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chasers by the execution of assignments in blank and irrevocable powers of attorney. These transactions have their warrant in judicial decision. In *Finney's Appeal*, 59 Penna. St. R., 400, it is said: "Pennock having assigned to Snowden, and delivered to him the certificate, with a power of attorney to transfer the stock on the books of the company a month and a half before the levy at the instance of Finney, trustee, passed Pennock's interest in it to him, and although it stood on the books of the company in the name of Pennock, a sale of it in his name would not divest Snowden's prior title; so that Snowden's sale afterwards, in pursuance of the pledge of the stock with notice to Finney and Pennock, passed a good title to the stock. That this was the effect of the assignment and delivery of the stock to Snowden is clearly shown in *Commonwealth vs. Watmough*, 6 Wharton, 117, and in *Building Association vs. Sendmeyer*, 14 Wright, 67."

Without doubt the holder of a certificate of stock with an assignment in blank and an irrevocable power of attorney executed without notice, and for value, will be protected in his title. Such protection has its foundation in the principle that the owner, having placed all the *indicia* of title in another, will not be permitted to deny the title of the vendee who has purchased the same on their faith, and without notice of the owner's rights; but it is here contended that as appellant was a married woman in 1886, when she delivered the certificate and executed the assignment in blank and irrevocable power of attorney, no title passed to the holder, because it lacked the essential necessary to pass the title—namely, the assent of her husband. At the time of their execution the assent, oral or written, of the husband was necessary to pass title to the holders.

The husband testified that he objected to the loan of the stock to her brother, that he "signed the power of attorney as a witness, that the brother asked him to sign it and that he objected all along before the signatures were put down." And after the papers were executed he says: "I don't know that I said anything after I found that they were signed and delivered; I don't know that I objected any more." When asked what he said to indicate his objection, he replied: "I don't just remember the remark that I made, except this one thing. I said to him, says I, 'If you take this stock, if you get it, it would go the way the First National Bank stock went, which you borrowed and neglected to return.'" At the time the stock was

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loaned a note for \$11,000 was given to appellant, and this was in the writing of the husband. The wife, the appellant, says: "She signed the power of attorney and that she received the note for \$11,000, and that her husband said that he 'was afraid that when the time went around (sixty days) he would not return it.' It would be like the First National Bank stock, he would keep it. 'That was all he said.'" When asked if he signed it of his own accord, she replied that while there were no other witnesses there "I do not know what he did of his own accord. Of course, we had to have a witness to the transfer."

The brother, James M. Danner, testified that he was pretty positive that "the words filled in with pen, on the date of the power of attorney, 25th day of March, A. D. 1886, is in the handwriting of William H. Souder; that he handed him the certificate and power of attorney." "I think my sister objected." "She said as much as she did not like to give up the certificate without its value for it, and we talked the matter over and I suggested to Mr. Souder that we give an individual note, and he suggested that the amount be \$11,000 at sixty days. He seemed to be satisfied, and he said he would witness the signatures and he drew the note, and I took the note to Schall's house and got him to sign it." Again: "Mr. Souder said that Mary ought to have something to show that she had given up the certificate, and suggested that we should give an individual note. And Mr. Souder named the amount and filled up the note, and I took it to Mr. Schall's as I said before, and had him sign it, as you see in the note." "Then when I brought the note back, I don't know whether Mr. Souder had signed the certificate before or after I had brought the note back." On cross-examination he was asked: "Aint it a fact that Mr. Souder refused to consent to your taking the stock away?" He answered: "He did, until I suggested we give her that note, and then he witnessed my sister's signature."

The master finds: "There seems to have been considerable demur and objection on the part of Mrs. Souder and her husband, who was present at the interview, to the lending of the stock; but as a result of the interview the certificate was delivered to James M. Danner, it being lent on sixty days and to be returned at the end of that time. As a memorandum of the transaction a note for \$11,000, payable one day after date, was given on March 26, 1886, by James

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M. Danner and Michael Schall. This note was drawn by Mr. Souder. Accompanying the certificate of stock was a power of attorney to transfer the same in blank, and was given to James M. Danner. It was a printed form and was signed by Mrs. Souder." The date was filled in by Mr. Souder and also the number of shares and name of the bank, and the paper was witnessed by him. It appears that while the husband originally objected, yet the drawing of the note, the filling up the blank in the power of attorney and the witnessing it, justify the conclusion that he did finally consent to the transfer and delivery of the stock by his wife. He witnessed that it was "signed, sealed and delivered" in his presence. It is not possible that he intended when he thus witnessed her execution and delivery that he did not assent thereto. His assent to the execution and delivery of the assignment and power of attorney is therefore manifested by his signature as a witness. In *Brown's Appeal*, 94 Penna. St. R., 367, where the wife certified that a new judgment should take precedence of one held by her, in order to secure a loan for her husband, the instrument was witnessed by him, and it was held to be an executed certificate which operated as a release of her prior right of lien. It is contended that as appellant's husband did not unite with her in the execution of the assignment and power of attorney, the holders, in pledging the stock, were not clothed with an apparent title, and under *Leiper's Appeal*, 108 Penna. St. R., 383, the appellee is not entitled to be protected in his title. But in that case there was no evidence upon the instrument of the husband's assent, and nothing to indicate it, and Mr. Justice Trunkey said: "The powers of attorney signed by Mrs. Leiper not being accompanied by written evidence of the assent of her husband, *prima facie*, were insufficient to vest the apparent title to the stock in Green. His right depended on oral and written evidence. Without oral testimony of Leiper's assent, the writing of his wife passed nothing. They did not confer upon Green by a written transfer all the *indicia* of ownership of the stock; the written assent of the husband was wanting." Again: "The fact that Mary Leiper alone signed the powers was enough to warn purchasers or pledgees to ascertain whether she made the transfers with her husband's assent."

In the present case, when the appellee made the loan and received the stock as security, it found the assignment and power of attorney duly executed by appellant, the date in her husband's writ-

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ing, and his signature thereto, witnessing her signing, sealing and delivery of the stock. This evidence of his assent was upon the instrument itself, and parol testimony was not necessary to establish it. The purpose of its execution was to make an assignment of the stock with power to make a transfer upon the books of the bank, and to consummate it appellant's husband witnessed it. To say that he did not assent to it, when he signed for that purpose, is to assert that which the act conclusively negatives. When the holders made the loan from this appellee they thus possessed all the *indicia* of title of the stock; and, if so, it will be protected in its title, obtained from them. In Wood's Appeal, 92 Penna. St. R., 390, it is said: "By commercial usage a certificate of stock accompanied by an irrevocable power of attorney either filled up or in blank is in the hands of a third party presumptive evidence of ownership in the holder. And where the party in whose hands the certificate is found is a holder for value without notice of any intervening equity, his title can not be impeached." The title to this stock, obtained by appellee from its holders clothed with ownership, is therefore unimpeachable, unless it had notice of the claim made to it by appellant. While it is conceded that when it made the loan upon this stock it did so in good faith and without any knowledge of any claim, it is urged that the appellee was put upon inquiry, which is the equivalent of actual notice. As the holders, when they effected the loan from the appellee, were in the possession of the stock and had the written evidence of ownership, common prudence and ordinary diligence did not call for inquiry, and under such circumstances to require it would be to exact caution without any reason for it.

In Leiper's Appeal, *supra*, it is said: "Just here this case differs from Wood's Appeal, 92 Penna. St. R., 379, Burton's Appeal, 93 Id., 214, and other cases controlled by like principles, wherein the transferees not only found the possessors of the stock from whom they purchased clothed with written evidence of ownership, but no circumstance to put them on inquiry." While there was nothing in the execution of the assignment and power to put appellee upon inquiry, the fact that the ownership established by the *indicia* of title possessed by the holders, dated nearly two years previous to the loan, can not be said to be either a ground of suspicion or cause for inquiry. As the appellant had executed the assignment and the power of attorney, and as her husband had assented thereto as shown

Jones vs. Philler et al., etc.

by the instrument itself, it was not a matter of significance against the title whether they did so many months previously, but, on the contrary, was in favor of it, because indicative of an unquestioned ownership and an acquiescence in the same for a length of time.

For these reasons this judgment is affirmed.

Court of Common Pleas of Montgomery County.

JONES VS. PHILLER, OWNER, AND ENSINGER, CONTRACTOR.

Where the name of the claimant is set out in the mechanics' lien, and the effect of a substitution is not to add a new claimant but merely to set forth his title, the court will allow an amendment.

PETITION of claimant to change name of claimant, William Potts Jones, so as to read Joseph C. Jones, Rachel R. Jones and William Potts Jones to the use of William Potts Jones, and to make said change in the body of the lien. No. 23, October T., 1891.

Holland & Dettra, Esqs., for motion.

H. M. Brownback, Esq., contra.

Opinion of the court by WEAND, J., December 5, 1892.

We think the amendment asked for should be allowed. The claim as filed sets forth the name of the claimant or person entitled to such lien, as required by law. The effect of the substitution is not to add a new claimant or new party to the proceeding, but merely sets forth the claimant's title. The defendant still has to defend against the same person. We think, moreover, that the same result could have been accomplished by testimony, and that if otherwise entitled to recover the amendment would be unnecessary.

And now, December 5, 1892, amendment allowed.

O'phaus' Court of Montgomery County.

ESTATE OF PHILIP STONG, DEC'D.

The measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the management of his own estate.

Executors are liable for their own acts and omissions and not for those of their associates; but where the will imposes a joint duty it is cast upon the executors, and one can not relieve himself from all responsibility by entrusting the whole duty to his co-executor. A direction to invest certain funds in good real estate security imposes a joint duty on the executors which is not discharged where one of the executors gives no attention whatever to the investments, but allows his co-executor to invest in personal securities without any remonstrance whatever.

EXCEPTIONS to auditor's report.

Larzelere & Gibson, Esqs., for exceptants.

Geo. W. Rogers, Esq., for accountant.

Opinion of the court by SWARTZ, P. J., November 6, 1893.

The controversy is raised by the following exception to the auditor's report: "The learned auditor erred in not surcharging the accountant with the sum of \$733, being the credit claimed by the accountant as the amount not collected on the Wilson bonds."

The facts material to the issue are not in dispute. They may be stated as follows: Philip Stong died, testate, October 3, 1887. His widow died September 18, 1888. The testator gave to his wife his entire estate for life, with the privilege of using so much thereof as may be necessary for the comfortable maintenance of herself and his niece, Alice Dotts.

Upon the death of the wife the will makes the following disposition: "I order and direct that upon the death of my said wife my said executors shall set apart out of the balance or residue of my estate the sum of twelve thousand dollars, and safely invest the same upon good real estate security, and pay over the interest accruing therefrom semi-annually to my said niece, Alice Dotts, daughter of my sister Susan, during the full term of her life."

Among the assets of the estate were two bonds, one with confession of judgment for \$600 given by Thomas Wilson on November 1, 1883, payable in one year; the other without such confession,

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made by the said Thomas Wilson for \$355, dated April 6, 1882, also payable in one year.

Algernon S. Jenkins, the co-executor, was a man of business experience, and he had the possession and custody of the Wilson bonds. Interest was paid on the six hundred-dollar bond to November 1, 1888, and on the other bond to April 6, 1889. The last interest was paid to Mr. Jenkins on the 10th of April, 1889.

Mr. Jenkins died July 9, 1890. The surviving executor made demand for the Wilson papers after the death of Mr. Jenkins, but they were not delivered to him at that time. As soon as he received them he handed them over to his counsel, Mr. Rogers. The bond with the confession of judgment was entered of record March 10, 1891, and on April 29, 1891, Thomas Wilson confessed judgment on the other claim by giving a bill single, which was entered the same day.

At the testator's death Thomas Wilson was the owner of a farm in Horsham township containing sixty-one acres. He also owned a house and lot in Hatfield township. There was a mortgage of \$2,000 on the farm and one of \$1,600 on the house and lot; there was also a judgment of \$600 entered April 6, 1887. These properties were appraised at \$9,500 in 1891, and were fully as valuable in 1887 as in 1891.

The situation as to liens against the Wilson properties remained unchanged at the time of the testator's death in September, 1888, but on April 1, 1889, a judgment for \$1,300 was entered; April 1, 1890, one for \$200; May 28, 1890, one for \$200; September 15, 1890, one for \$350. Mr. Wilson made an assignment for the benefit of creditors on May 1, 1891.

The sale of the real estate by the assignee realized a sufficient fund to pay all the judgments prior in time to the Stong liens and paid on the Stong judgment of six hundred dollars \$181.48. The judgment of \$200, entered May 28, 1890, did not participate in the distribution. Mr. Wilson's real estate was released from this claim, so the auditor finds.

The accountant purchased the farm at fifteen hundred dollars over and above the mortgage encumbrance, making the purchase money \$3,500 and the overdue interest on the mortgage of \$2,000 at the time of the sale. He now holds the farm for sale, and will take \$6,000 for it. He spent in permanent improvements over \$100.

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The accountant says: "Jenkins had all to do with the papers. I had nothing at all to do with the papers until after Mr. Jenkins died. * * * I don't know whether they were judgments or not. * * * Before his death Jenkins attended to it himself. I gave the Wilson matter no attention."

From the recital of these facts it is apparent that the entry of the bond for \$600 prior to April 1, 1889, and the reduction to judgment of the bond for \$355 prior to said date, would have saved both bonds to the testator's estate. Again, if the bond had been entered of record prior to April 1, 1890, it would have been paid in full.

After the death of the widow in September, 1888, it became the duty of the executors "to set apart \$12,000 and safely invest the same upon good real estate security." The auditor finds that the whole principal estate did not exceed \$12,000. Why was this plain direction of the testator disregarded?

The accountant answers that he is excusable because the co-executor had the custody of the papers and collected the interest. But this will not do, for by the will a joint duty is cast upon the executors which they agreed to perform when they accepted the appointment. That a direction to invest in good real estate security for the life of Alice Dotts imposed a joined duty can not be denied, and under our authorities one executor could not relieve himself from all responsibility in the matter by entrusting the whole duty to his co-executor. In *Weigan's Appeal*, 28 Penna. St. R., 471, the testator directed his executors to secure \$500 and pay the interest yearly to his daughter for life. One of the executors, a son, owed the father \$500 on a bond. The co-executor made no effort to collect the bond and secure the fund. The money was lost through the insolvency of the executor so indebted to the estate, and the co-executor was held liable to the legatee for the loss. *Weldy's Appeal*, 102 Penna. St. R., 454, is to the same effect. In such cases the non-acting executor is not liable for the default of his co-executor, but he is responsible for his own negligence, because the loss resulted from joint negligence where a joint duty was imposed. So in *Fesmire's Estate*, 134 Penna. St. R., 86, where the testator directed an investment "in good real estate security," there was a joint duty imposed to secure such investment. The court say: "When they put it in Kerper's power to collect the money on the mortgage it became their duty to see that it was again invested 'in good real estate

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security'; and if they had not neglected this duty the loss would not have been sustained. They did neglect it. The embezzlement was made possible because they neglected it, and their liability grows out of their negligence."

Ordinarily an executor is liable for his own acts and omissions, and not for those of his associates. And it may well be, as the auditor intimates, that the accountant is not liable for the negligence of his co-executor, Mr. Jenkins; but, as already shown, this is not the test of liability in the case before us. The inquiry is, Was the accountant himself negligent? The auditor finds no evidence of negligence. We can not agree with him.

"As a general rule, the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the management of his own estate: Fahnestock's Appeal, 104 Penna. St. R., 46. It is equally well settled, however, that a trustee who invests the funds belonging to a trust on personal security does so at his own risk. This is so well settled that a citation of authorities is unnecessary": Law's Estate, 144 Penna. St. R., 499.

If it were not for the explicit direction in the will there might be some excuse for continuing the investments as made by the testator. The direction to invest safely in good real estate security leaves the accountant without any excuse for his omission. But suppose there was no immediate necessity to change these personal securities into investments designated by the will, does the delay under the facts and circumstances indicate ordinary prudence and skill?

The accountant confesses his entire ignorance of the matter. He did not even know whether the bonds were judgment bonds. "I did not give the Wilson matter any attention." The interest on the \$600 bond was due November 1, 1889, and it remained unpaid. All other persons holding judgments against Mr. Wilson entered them of record. These executors alone did nothing to protect their claims, although the failure to pay interest ought to have stirred them to action. There was no difficulty in their way; at least, not so far as the \$600 bond was concerned. All that was necessary to secure the debt was to carry the bond to the office for record. If this had been done at any time between the death of the testator in 1887 and April 1, 1890, the money would not have been lost.

Stong's Estate.

The Wilson failure was not the result of some sudden misfortune. His financial standing grew weaker and weaker, as indicated by the successive entries of judgments against him. There was thus ample notice of danger to creditors. If the executors had exercised the care and prudence of others similarly situated, the loss could not have occurred: Long's Estate, 6 Watts, 46.

It may be said that suit was necessary to protect the bond of \$355. This may or may not be so. If the debtor was willing to give a judgment for \$600, it is likely he would have given one for the smaller bond. If he accommodated others as early as 1887, why should he refuse the executors of the testator as late as 1890? All we know as to this matter is that no effort whatever was made to comply with the explicit direction of the testator. An unsuccessful effort would excuse. Without effort the accountant is without excuse. It is clear that if the diligence exercised after the death of Mr. Jenkins had been applied before that time, the loss would not have occurred.

We conclude that the accountant was negligent in his disregard of the duties imposed under the will, and he was negligent in his failure to take the usual and ordinary steps to protect or collect the assets of the estate of the testator.

Under this conclusion it is not necessary to consider the other branch of the case. The sale by the assignee was not the sale of the executor; the latter had no control over the sale whatever. And under *Fisk vs. Sorber*, 6 Watts, 18, it would seem the accountant was capable of becoming the purchaser of the farm in his own right, discharged from any trust.

And now, November 6, 1893, the exception to the report of the auditor is sustained and the surcharge of \$733 is directed. The auditor will make a redistribution in accordance with this opinion.

Court of Quarter Sessions of Montgomery County.

IN RE PETITION FOR VACATION OF A PUBLIC ROAD IN THE TOWNSHIPS OF ABINGTON AND CHELTENHAM.

A petition to vacate a public road should set forth the circumstances which render such vacation necessary.

If neither the petition nor report set forth more than that the road is useless, inconvenient and burdensome, there are no facts before the court upon which it can base its judgment.

EXCEPTIONS to report of viewers.

Chas. H. Stinson & Son, Esqs., for exceptants.

Holland & Dettra, Esqs., contra.

Opinion of the court by WEAND, J., October 2, 1893.

The petition in this case asks for the vacation of a public road because the same "has become useless, inconvenient and burdensome."

The proceeding is under the act of 13th June, 1836, P. L. 558, Sec. 18.

The distinction between a proceeding to lay out a road and one to vacate a road is clearly defined in *Newville Road Case*, 8 W., 172, where it is said that the latter proceeding is a matter purely within the discretion of the court. In a proceeding to lay out a road the act defines definitely the duties of the viewers and what they shall return; and, this being done, the court adopts their conclusions, unless good reasons to the contrary are shown.

In a proceeding to vacate, however, we find no specific directions as to the duty of the viewers because as the court is to judge of the propriety of the proceeding it is only necessary to show by the petition and report such facts as will induce and aid the court to exercise its discretion. In order that the court may act intelligently in the first instance, the twenty-third section of the act provides that "every application to vacate a road, as aforesaid, shall be in writing and signed by the applicants; it shall set forth, in a clear and distinct manner, the situation and other circumstances of such road or highway, or of the part thereof which the applicants may desire to have vacated as aforesaid." The object of this requirement is ap-

In re Vacation of Road.

parent—that the court may, before appointing viewers, be informed of the circumstances which render the road unnecessary. It is an essential part of the petition to enable the court to act.

In the case under consideration no facts or circumstances are set forth, either in the petition or report, other than that the road is useless, inconvenient or burdensome; but of this the court is to judge from the “situation and circumstances.” How are we then to exercise a discretion or to know whether the facts are sufficient to justify the finding of the jury?

The mischief likely to result from such a course of procedure is easily seen. No notice is required under the act of Assembly or rules of court except to land-owners or occupants of the vacated road. And thus a person owning land on both sides of a public road, which may have been laid out for many years and generally used by the public, has it in his power to procure a vacation of the road without a single resident of the township other than himself having either actual or constructive notice thereof. Before such a result can be obtained the act should be strictly followed, so that before adopting the report of the jury the court may be fully advised. It is no answer to say that this would be assuming that the jury would not do their duty properly, for where no one appears to object they might well assume that no one was opposed to the proceeding.

The road asked to be vacated is on the line of two townships, and was laid out and traveled for many years. On the county map it would appear to be an approach to a thriving borough and the railroad station, and we would therefore require good reasons for its vacation; and as no notice was served on the supervisors or the public, without the slightest degree reflecting upon the viewers or the applicants, we think our duty requires us to set aside the report because neither the petition nor report is in conformity with the requirements of the act of Assembly.

For all we know, the jury may have adopted a conclusion of law or been influenced by facts which could be satisfactorily explained. Hereafter, in all proceedings to vacate roads in townships, we shall require notice to the supervisors and the public.

And now, October 2, 1893, the exceptions are sustained, the report of the viewers is set aside, and the petition is quashed.

Court of Common Pleas of York County.

SPAHR VS. HESS.

A judgment was obtained before a justice of the peace against H. (a married woman) and A. (her husband), and transcript filed in the Common Pleas. The record failed to state that H. was a married woman. On a motion to strike off the judgment, *held*, that the motion must be overruled.

A motion to set aside or strike off a judgment must be upon the ground of invalidity appearing on the face of the record.

A judgment against a married woman before the passage of the act of 1887, presumed to be void, is now presumably valid, and it is no longer necessary to the validity of such a judgment to set out on the record the facts which, before the passage of the act, were essential to the validity of the judgment.

RULE to strike off judgment.

The petition in this case was as follows: That the above judgment upon which said fi. fa. was issued was entered in your honorable court upon a transcript from the docket of William T. Williams, a justice of the peace in and for said county; that said judgment was rendered against your petitioner by said justice for \$52.58 upon a certain promissory note signed by your petitioner and her husband, Adam Hess; that at the time of signing said note she was and still is the wife of said Adam Hess, who is also living; that your petitioner is advised and believes that the judgment so rendered by said justice is void and unwarranted by law, as shown by the transcript; that by virtue of said writ of fi. fa. the Sheriff of York county has levied upon the real estate of your petitioner and the following personal property: 16 acres of wheat, 4 acres of rye, 13 acres of corn planted, 5 acres of oats, 2 stacks of hay, and lot of manure, and has advertised the same to be sold on July 1, 1891.

Your petitioner therefore prays your honorable court to stay the execution issued upon said judgment by said plaintiff, to strike off the said judgment or to open the same and let her into a defence. And she will ever pray, etc.

Stewart, Niles & Neff, Esqs., for rule.

E. D. Bentzel, Esq., contra.

Opinion of the court by BITTENDER, J., October 16, 1893.

The Courts of Common Pleas have no power to open and set aside judgments of justices of the peace, a transcript of which have

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been entered in the former court for the purpose of lien, except when such judgments are brought into court upon a certiorari or appeal. The judgment is still in force before the justice, and any attack upon it must be made there: *Daily vs. Gifford*, 12 S. & R., 72; *O'Donnell vs. Seybert*, 13 Id., 54; *Lacock vs. White*, 19 Penna. St. R., 495; *Boyd vs. Miller*, 52 Id., 431; *McKinney vs. Brown*, 130 Id., 365.

In the opinion in the last mentioned case, delivered by Paxson, C. J., the exception to the above rule is stated to be when the transcript shows that the judgment was *void*. In such case the judgment will be stricken off. In that case, viz., *McKinney vs. Brown*, it was decided that the judgment should be stricken off because the record showed that the action was against a husband and his wife, and did not show that the judgment was lawfully entered for a purpose for which the wife could bind herself, or a claim upon which she was liable under the statutes in force at the time of the rendition of the judgment.

The cases in which the Supreme Court sustains this ruling are numerous, and the law was well settled until changed by the married woman's act of June 3, 1887. Upon judgments recovered after the passage of this act, brought before the court, it was decided that the rights and liabilities of married women in this state have been completely changed by the said act; that a judgment against a married woman before the passage of the act of 1887, presumed to be void, is now presumably valid; and that it is no longer necessary to the validity of such a judgment to set out on the record the facts which, before the passage of the act, were essential to the validity of the judgment.

A motion to set aside or strike off a judgment must be upon the ground of invalidity appearing upon the face of the record: *Littster vs. Littster*, 151 Penna. St. R., 474; *Adams vs. Grey*, 154 Id., 258.

It does not appear from the record of the judgment in question that the defendant, Hetty Ann Hess, was a married woman; and if it did, as we have seen, it is no longer necessary that the judgment shall be self-sustaining upon the record to bind a married woman. Her remedy is by certiorari or appeal. In the language of the opinion in *Adams vs. Grey*, *supra*, "there is nothing in this case to justify either the striking off or the opening of the judgment."

The rule is discharged.

Court of Common Pleas of Montgomery County.

IN EQUITY.

A. JACKSON SMITH, HOWARD CLAYTON, FIRMAN E. FOY, JOSEPH E. NICE, CHARLES HARPER AND W. A. GROSS, M. D., COMPLAINANTS, VS. ANDREW H. BAKER, A. C. HERITAGE, M. D., THOMAS FITZGERALD, ROBERTS COLES, FRANK WEBB AND PAUL WISE, DEFENDANTS.

The act of May 11, 1893, P. L. 44, to enable borough councils to establish boards of health, is not unconstitutional because of any defect in the title. Nor does the act offend against Art. III, Sec. 20, prohibiting the Legislature from delegating to any commission power to interfere with any municipal function.

A board of health established under said act has no authority to enter upon the lot of a property owner for the purpose of digging a cess-pool thereon, although the drainage from the property collects in pools on the street and becomes stagnant. The health board and council have other adequate remedies, and the necessities of the case are not such as to justify the act.

APPLICATION for a preliminary injunction.

Larzelere & Gibson, Esqs., for complainants.

J. B. Larzelere, Jr., and Childs & Evans, Esqs., for defendants.

Opinion of the court by SWARTZ, P. J., November 20, 1893.

The defendants constitute the board of health and the health officer of the borough of Jenkintown. The board was established by the borough council under an act of Assembly approved the 11th day of May, 1893, P. L. 44.

The complainants were notified to abate certain nuisances. The notice served upon complainant Smith by health officer Wise reads as follows: "To Jackson Smith, Jenkintown borough, Montgomery county, owner, agent or occupier of premises situate on Division street, also Leedom street—You are hereby notified and required to abate and remove within five days of the date of the service hereof a certain nuisance on the above described properties, consisting of draining kitchen or waste water into the streets, which nuisance has been declared to have a tendency to endanger and be prejudicial to the public health. On failure to do and perform which, suit will be entered against you agreeably to the provisions of the ordinance passed by the council of Jenkintown in accordance with the act of Assembly. By order of the Jenkintown Board of Health."

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The defendants allege that the complainant Smith gave no heed to this notice. The health officer then entered upon the premises and through his workmen, and against the protests of complainant, began the digging of a well or cess-pool upon each of the five lots of complainant. Similar proceedings were instituted against the complainant Foy with like results.

This bill was brought to restrain the defendants from making further excavations on the complainants' premises.

The constitutionality of the act of May 11, 1893, is attacked. First, it is contended that the act contravenes Sec. 20, Art. III, of the Constitution; and secondly, that the act violates Sec. 3, Art. III, which provides, "No law shall be passed containing more than one subject, which shall be clearly expressed in the title."

Sec. 20, Art. III, declares: "The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes, or to perform any municipal function whatever." An examination of the act in question discloses that there is no provision in the statute for the appointment of a commission interfering with municipal improvements or any municipal function.

The act carefully protects the rights and powers vested in the borough council. This is indicated by the title of the act, "To enable borough councils to establish boards of health." The council establishes the board of health; the appointees must give bond to the borough for the faithful discharge of their duties. The rules and regulations of the board of health have no binding power until approved by the council. All fees and penalties are to be paid into the borough treasury for disposition by the municipality. The board of health must submit reports to the council. These provisions all indicate that the board of health is the creature of the municipality.

The members of council serve without compensation, and may not be able to give the necessary personal attention to the sanitary needs of the borough; the Legislature therefore provided the means whereby the borough may secure the needed help. The action of the board of health, under the rules and regulations approved by the council, is the action of the municipal authority, just as the author-

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ized work of the street and road commissioner is the work of the borough council.

The contention of the complainant is not sustained by Perkins et al. vs. Philadelphia, 156 Penna. St. R., 554, for the board of health takes from and through the borough, not independently of it nor directly from the commonwealth.

Is the title of the act sufficient to sustain the provisions of the statute?

The title must embrace the subject of the proposed legislation, and express the same so clearly and fully as to give notice of the legislative purpose to those who may be specially interested therein. But the title of an act need not be a complete index of its contents. All that is necessary is that the subject of the proposed legislation is expressed so as to give notice of its purpose to members of the Legislature and others specially interested. When the sections of the act are clearly germane to this expressed subject, they do not offend against the constitutional prohibition: Phoenixville Borough Road, 109 Penna. St. R., 44; Com. vs. Sellers, 130 Id., 35.

The title of the bill before us expresses the subject of legislation to be the establishing of boards of health by boroughs. This is the sole subject. It is general. "But mere generality of meaning in the title ought not to avoid a law. For instance, the title 'An act relating to executions' is quite general as an expression of the subject of the act; yet no one could doubt the power of the Legislature, under this title, to provide for the various kinds of execution generally comprised within the term execution": Dorsey's Appeal, 72 Penna. St. R., 192.

The title in controversy is similar to that of the act of April 18, 1867—"An act to establish criminal courts in Dauphin, Lebanon and Schuylkill counties." This title was held sufficient to sustain provisions in the act "for the appointment and election of the Judges, as to who should act as clerk, and by whom the grand and common jurors should be chosen and summoned": Com. vs. Green, 58 Penna. St. R., 233.

Every provision in the act before us is germane to the subject expressed in the title. The title is not misleading, but, on the contrary, reasonably leads to an inquiry into the matters embraced in the body of the bill, and this is all that is necessary: Mauch Chunk vs. McGee, 81 Penna. St. R., 438; Com. vs. Depuy, 148 Id., 201.

It is argued that the title is insufficient because it fails to give any notice of the proposed legislation concerning the powers and duties of the board of health.

Giving the borough council authority to establish a board of health does not imply the formation of a board without duties or powers. A body of men without any authority, powers or duties, does not constitute a board of health. The words "board of health" have a well understood meaning. The members of such board are officials specially charged with the preservation of the general health of the community or people at large. A member of the Legislature reading the title of the act under consideration could not reasonably infer that the General Assembly proposed to provide for the creation of a board of health without in some way defining its relations to the municipality, limiting its powers, and defining its duties and responsibilities.

We conclude the act does not offend against the provisions of the Constitution referred to. Did the defendants exceed their authority when they entered upon complainants' properties for the purpose of digging wells or cess-pools?

It is the duty of the board to see that nuisances are abated. The imposition of the duty carries with it the powers necessary to discharge the duty.

Among the objects sought to be secured by municipal government there is none more important than the preservation of the public health. In well regulated municipalities it becomes an object of paramount concern. There are times when prompt action is imperative, and boards of health must have the discretion and powers necessary to meet the emergencies. Courts will not lend their restraining aid except in cases where such boards clearly transcend their powers.

While we do not wish to discourage in the least the board of health of Jenkintown in its efforts to promote and protect the welfare of the citizens of the borough, we can not allow the board to exercise unnecessary powers which clearly infringe upon the private rights of the citizen.

It is undoubtedly true that boards of health may as a police regulation direct the use of private property so as to prevent its

proving pernicious to the citizen, and such direction may interfere with private rights, but they can only do so when the measures are necessary to protect the public health: *Baker vs. Boston*, 12 Pick., 193; *Salem vs. Eastern R. R.*, 98 Mass., 431.

The legality of a particular act must be tested by the inquiry whether such act was necessary to protect the public health, whether the exercise of the power was necessary for the proper discharge of the duties imposed upon the board of health. In the case before us there was no rule or regulation of the board requiring citizens to dig wells or cess-pools on their premises, nor was there any such rule or regulation applicable to any particular street or locality, nor was there any notice to the complainants that such wells were necessary for their particular premises. The affidavits before us do not disclose any notice of a demand for such wells or of an intent to dig them prior to the time the workman began the excavations. On the contrary, the notice to abate the nuisance declared "on failure to do and perform which, suit will be entered against you."

In locating the wells the owners of the properties were not consulted. The owner may have contemplated improvements that are defeated by the location of the cess-pool, although some other location might have answered every purpose of the board without interfering with the owner's intended use of the property. The exigencies must be great where a man's property may be taken, injured or destroyed without according to him notice and a hearing. "The next thing to depriving a man of his property is to circumscribe him in its use; and the right to use property is as much under the protection of the law as the property itself, in any other aspect, is, and the one interest can no more be taken out of the hands of the ordinary tribunals than the other can. If a man's property can not be taken from him except upon trial by jury, or by the exercise of the right of eminent domain upon compensation made, neither can he in any other mode be limited in the use of it": *Hutton vs. City of Camden*, 39 N. J. (Law), 130. The exception to this rule must be based on public necessity.

It follows that the action of the board of health was apparently an invasion of the rights of property—a claim to enter upon, use and interfere with land without the owner's consent and without notice or hearing accorded to him. A right of this character the law guards with jealous care. To justify the action of the board the necessity

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must be akin to that which justifies the destruction of property for the public safety in the case of the prevalence of a devastating fire. This brings us to the important issue in the case, Was the necessity sufficient to justify the act?

Dr. Heritage, a member of the board of health, describes the nuisance. He says: "In front of Foy's premises, in the gutter, I saw pools of stagnant water, and pools were also collected in the middle and across the street and in the gutters below, and said matter was also drained into abutting lots. The matter coming from the pipes from said premises contained fatty substance and decayed vegetable matter; it collects in the gutters and streets, and is noisome, obnoxious and deleterious to public health. Such waste and matter contains and propagates germs which are calculated to generate disease. In my opinion as a physician I would say that the draining of such matter from the Foy premises into the street creates a public nuisance and is detrimental to the public health." The health officer says: "The waste matter from his premises collects in pools in the centre of and along the sides of the street, becomes stagnant, and from the fatty matters and filth which it contains creates bad, offensive and unwholesome odors."

The complainants contend that the street in front of the premises is not properly graded; that the stagnant pools are the result of the defective grade of the street. This may be true, in part at least; but the rules and regulations of the board of health, approved by the borough council, provide that no house refuse, offal, garbage or organic waste substance of any kind shall be thrown upon any street, road, ditch or gutter. And Rule 17 provides: "It shall be unlawful for any one to drain anything into the streets or gutters of the borough which shall be injurious to the health of the borough."

These regulations seem to us entirely proper and necessary to maintain the health of the community. The court should not interfere unless the rules are clearly unwarranted and without authority. "The importance of sustaining the board in all lawful measures tending to secure or promote the health of the city, should make us cautious in declaring any curtailment of their authority except on clear grounds. On the contrary, powers conferred for so greatly needed and most useful purposes should receive a liberal construction for the advancement of the ends for which they were bestowed": *Gregory vs. New York City*, 40 N. Y., 279.

The nuisance therefore consisted of these stagnant pools on the street, caused, in part at least, by complainants draining injurious matter into the gutters of the street. The board had the right to take steps to abate the nuisance. This could be done by removing and cleaning away the stagnant pools, thereby securing immediate relief, although the cause for future trouble might still remain. The rules and regulations of the board provide how the source of trouble may be reached. Penalties can be enforced; the costs of removing the stagnant pools can be recovered. If these proceedings are not sufficient to prevent future violations, the court, upon application, will issue a restraining order enforcing obedience to the rules of the board: *Haugh's Appeal*, 102 Penna. St. R., 42; *Quincy vs. Kennard*, 151 Mass., 563.

These proceedings may require time, and delays may be dangerous; but we must remember that the nuisance itself is upon the streets, and can be removed at once. The remedies we speak of relate to the cause of the nuisance, and not the existence of the nuisance itself. In the case before us, the time taken to dig the well and make the proper connections with the house will necessarily exceed the time required to secure an injunction against the property owner restraining him from casting into the streets the injurious waste of his kitchen.

We find no necessity for the exercise of the extraordinary power claimed by the defendants when they entered upon the complainants' lots to dig wells without any notice or hearing before the work was commenced, and without any rule or regulation of the board of health providing for such interference with private property; and necessity alone can justify the act. The case is ruled by *Philadelphia vs. Provident Trust Co.*, 132 Penna. St. R., 224, where the court held there was no authority in the board of health to enter upon premises to fill up privy-wells and construct water-closets connecting with the sewers of the city. "The order requiring the owners to put in water-closets, if sustained by this court, might be far reaching in its consequences, and lead to serious and obvious abuses." Just as in the case before us, the necessity for the acts was not shown. The board could secure relief by means less arbitrary.

That the board may enter upon a lot to remove an existing nuisance we do not mean to deny, and our ruling is not in conflict with this principle. In the case before us the nuisance was in the street.

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The cause of the nuisance could not be destroyed except by methods which addressed themselves directly to the conduct of the persons occupying the premises. Under this view we see how futile the action of the board becomes. The digging of any number of wells upon the lot does not compel the occupants to drain the fatty kitchen waste into them; they may still, although unlawfully, cast injurious matter upon the street. To enforce the health precaution the board may have to resort to the very methods we suggested for their original conduct—an application to the court for the enforcement of obedience to their established rules and regulations.

If the complainants are sincere in their belief that such wells are prejudicial to the health of the occupants of the lots and destructive to the drinking wells of their neighbors, it is not likely that they will use the cess-pools unless compelled to do so.

We conclude that the contemplated action of the defendants, even if within the powers given to them, ought not to be exercised in the cases before us, because clearly unnecessary as well as insufficient to accomplish the purpose of the board. An interference with private property, to be tolerated, must serve some good purpose.

If we are right, the defendants are mere trespassers. Can we restrain them by preliminary injunction? Under the facts before us it is clear that the defendants honestly believed they had full power and authority to do the acts complained of. When legal proceedings were instituted questioning their right, work was promptly stopped. It would seem, therefore, that an injunction is wholly unnecessary. But, aside from this view, injunctions to prevent trespass are ordinarily refused because the remedy at law is adequate. An injunction will not lie for a past trespass. Did the hearing disclose that the trespass complained of is likely to be repeated, an injunction might be the proper remedy.

And now, November 20, 1893, the preliminary injunction prayed for is refused.

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IN EQUITY.

PENNSYLVANIA RAILROAD COMPANY VS. MONTGOMERY COUNTY PASSENGER RAILWAY COMPANY.

The word "street" in the street passenger railway act of May 14, 1889, P. L. 211, is used to describe the character of the company and not the highway to be used. Under said act an electric passenger railway can be built on a public road in a township.

The title of the act covers a road in a township as well as a street in a city or borough, and is not therefore unconstitutional.

The occupation of public roads or streets by companies incorporated under said act does not subject them to new servitudes, so as to entitle the owner of the fee to damages for the mere occupation of the highway.

The supervisors of a township are the proper local authorities to give the consent required by the act.

Under said act a company can be chartered to build a road in more than one borough or township.

MOTION for a preliminary injunction.

D. W. Sellers, Charles H. Stinson and Wm. F. Solly, Esqs., for plaintiffs.

Holland & Dettra and Henry Freedley, Esqs., for defendants.

Opinion of the court by WEAND, J., November 20, 1893.

The plaintiffs in this case allege that they are the owners in fee simple of a lot of land in Upper Merion township subject to a certain township road known as the Schuylkill River road running through it; that over said township road plaintiffs have constructed an iron bridge for the sole passage of their cars in such way as not to impede public travel; that the defendants are a corporation under the act of May 14, 1889, P. L. 211, entitled "An act to provide for the incorporation and government of street railway companies in this commonwealth," and claim the right to construct an electric street railway from a point within the borough of Bridgeport, thence through the township of Upper Merion, thence on certain streets in the boroughs of West Conshohocken and Conshohocken, and in the township of Whitemarsh. The line of this road extends along and upon the Schuylkill River road, under the plaintiffs' iron bridge, and opposite the plaintiffs' land. The bill prays for an injunction, because:

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1. "The act of Assembly [May 14, 1889] does not refer to or include the granting of charters to railway companies to build railways elsewhere than on the streets."

2. "That if said act undertakes to grant railway companies incorporated thereunder the right to construct, maintain and operate railways over township roads and outside of streets, it is unconstitutional, because the subject is not clearly expressed in its title, as required by Art. III, Sec. 3, of the Constitution of Pennsylvania."

3. "That the fee of said public road being in plaintiffs the public has a mere right of passage; that the occupation by defendants subjects it to an additional and different burden not contemplated when the land was appropriated for a public road, entitling the owner to damages; and that as the defendants are not invested with the right of eminent domain, their proceeding is unlawful."

It is also claimed on argument that the supervisors of a township are not the proper local authorities to give the consent required by the act, and also that the act does not contemplate the chartering of one company to build a road in more than one borough or township.

The distinction attempted to be drawn between a "street" as meaning a highway in a borough or city, and a "road" as a highway in a township, is, in our opinion, without merit.

Art. XVII, Sec. 9, of the Constitution of Pennsylvania, provides that "no street passenger railway shall be constructed within the limits of any city, borough or township, without the consent of its local authorities." The words "street passenger railway" are here used to designate the character of the railway and not the place of location, for otherwise it would be meaningless when it requires the consent of the township authorities. If it did not contemplate the building of this class of railways upon the highways of a township, why should their consent be obtained? The consent, when obtained, is for the use of the highway or roads.

In other sections of the Constitution the distinction between "railroads" and "street passenger railways" is evident, showing that as the words railroad and railway are synonymous terms the description of them as street passenger railways in said Sec. 9 was intended merely to refer to a class of corporations not included by the general terms railroad or railway. In other words, a railway intended to

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carry passengers only and not having the right of eminent domain, to be located upon highways.

We think it logically follows, therefore, that when the act of 1889 provides for the incorporation, etc., of "street railway companies," the designation was used in the same sense as employed in the Constitution, as descriptive of character and not of locality; and this is also manifest from the words used in the body of the act. Sec. 1 provides for a street railway on any street or *highway*, and requiring the streets and *highways* to be named; and the same terms are used in Sec. 4.

Sec. 15 again refers to "city, borough, or *township*," and requires consent of the local authorities, in compliance with Sec. 9, Art. XVII, of the Constitution.

Sec. 16 requires the construction to be commenced within one year "after the consent of the proper local authorities of the city, borough or township" has been obtained.

As showing in what sense the words "street passenger railways" were used, we may also refer to the title of the act of 23d March, 1878, P. L. 111, which provided for the "incorporation, etc., of street railway companies in cities of the third, fourth and fifth classes, and in the boroughs and townships in this commonwealth"—here again showing that the word "street" referred to the company and not the locality.

The act of 19th March, 1879, P. L. 9, by its title did not refer to townships; but the 16th section prohibited the construction of the street passenger railways therein referred to within the limits of any city, borough or township without the consent of the local authorities.

Sec. 20 of the act of 1889 expressly refers to the companies incorporated under the acts of 1878 and 1879, and enables them to accept its provision. It is difficult to see why a company incorporated under those acts should be allowed to occupy a public road in a township and exclude others who may desire to do so under the act of 1889.

We are further of the opinion that the general signification of the word "street" includes any public highway unless there is something to restrict its meaning, and that the Supreme Court has so decided.

In Road from Fitzwater Street to Shippen Street, 4 S. & R., 106, Judge Gibson said: "Exception is taken to these proceedings

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that the petition is not for a road or highway but for a street, and that the report is of a street. In common parlance the word street is equivalent to highway."

In *Starett's Road*, 8 Barr, 89, it was decided that "street or alley" in an incorporated town is synonymous with road, and that a street is strictly a road and may be and frequently is so denominated without any violation of grammatical propriety.

It is, however, contended that if the act was intended to refer to township highways that the subject is not clearly expressed in the title, and therefore in violation of the constitutional provision. But if we are right in our first proposition, then this objection is not well taken. The subject being street railway companies, it must be taken to refer to a corporation of that character no matter where located.

The title of the act is "An act for the incorporation and government of street railway companies in this commonwealth," thus covering everything strictly relating thereto. The title gives fair notice of the object and contents of the act, and no one can be misled by it. The companies are to be in "this commonwealth," and not in any particular district or locality. There has not been pointed out to us any section or clause of any section in the act which is not clearly germane to the subject expressed in the title. It refers to their incorporation and government, and unless the title should be an index of the contents of the act no more comprehensive words could be used. There is nothing to indicate any restriction as to locality; but, on the contrary, the words "in this commonwealth" expressly refer to any part thereof.

It is earnestly claimed that the act intends to authorize a road in one city or borough or local jurisdiction only; but we can not see how this contention can be sustained under a careful reading of the act. No restrictive words are in any manner used. When the act speaks of the ground upon which the road is to be located it says streets or highways, and when referring to locality it says city, borough or township within which it shall be located; but this is perfectly consistent with the idea that it shall be either one or all of the districts named. Indeed, to give it any other construction would defeat the very purpose of their organization in many cases. It is within the knowledge of all that these companies are intended to reach the suburbs of cities and boroughs, where pleasure grounds,

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railroad stations or summer resorts are located, and it is for the convenience of those who patronize these resorts or are obliged to reach these places that the roads are constructed. Of course the object could be obtained by the organization of different companies; but we do not believe that the Legislature intended this. The State Department has chartered numerous corporations of this character, and it would be a stretch of authority to declare that all those charters are illegal upon this ground. If the result of our construction of the law should be as claimed by plaintiffs that a road could thus be built from one end of the state to the other, the fault, if it is one, must rest with the Legislature.

The point contained in the ninth paragraph of the bill, to the effect that the construction of the railway upon the public road is imposing a burden different from that which was contemplated when the road was laid out, thus entitling the owner of the fee to compensation, is answered by a train of authorities which fill our reports. That the Legislature has the right to grant this use can no longer be doubted, and it is only necessary to refer to Phila. & Trenton R. Co., 6 Wh., 25; Snyder vs. Penna. R. R. Co., 55 Penna. St. R., 340; and other cases.

In Halsey vs. R. W. Co., 47 N. J. Eq. Rep., 380, it was held that "the ownership of land over which a street has been laid is, for all substantial purposes, in the public, although the owner retains the naked fee; and the right of the public to use it for public travel is the primary and superior right. Land taken for a street is taken for all time, and compensation is made once for all; and by the taking the public acquire the right to use it for travel, not only by such means as were in use when the land was acquired but by such other means as new wants and the improvements of the age may render necessary. Any use of a street which is limited to an exercise of the right of passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not in any substantial degree destroy the street as a means of free passage common to all the people, is a legitimate use and within the purposes for which the public acquired the land."

In Dutton vs. Norristown Pass. R. W. Co., 1 Montg. L. R., 4, Judge Boyer held there was "no mode provided by law to compel a passenger railway company, authorized to construct its tracks upon a public street, to give bond to secure consequential damages to the

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owners of property abutting on the street." This very question was decided in *Lockhart vs. Craig St. Ry. Co.*, 139 Penna. St. R., 419, and in *Rafferty vs. Central Traction Co.*, 147 Id., 579.

The only remaining question is as to whether the supervisors of a township are the proper "local authorities" to give the consent required by the act. If they are not, we are at a loss to understand who can give consent. By law, supervisors are charged with the opening and the repair of the highways and have complete control and supervision over them. They represent the township in this respect, and by the act of 15th April, 1834, P. L. 538, they are invested with the corporate powers of the township.

When the Legislature, therefore, required the consent of the proper local authorities of a township, it must have meant those who had control of the highways and who were charged with their care and supervision. For an abuse of authority they may be liable in a proper way, but we can not control their discretion in a matter over which the law has given them jurisdiction. It is clear that both the Constitution and the act of Assembly contemplated that such consent could be given, and having failed to designate any person or persons as the local authorities they must have intended those in whom was vested the corporate powers of the township.

We have endeavored to show that the plaintiffs' contention is not sustained by either law, reason or authority; and even if we were in great doubt as to defendants' rights, we would hesitate to grant a preliminary injunction. Corporations of this character are multiplying rapidly, and we must assume that they are demanded by the public. Large sums of money have been invested in their construction under the belief that they are legally organized and have been constructed and located according to law. The injury which would follow by a construction of the law which would declare them to be illegal, for the reasons here assigned, would be so great that a court of equity should hesitate to act unless clearly convinced that a strict reading of the law imperatively demanded it.

And now, November 20, 1893, the motion for a preliminary injunction is overruled.

**P. L. EGOLF & SON VS. M. BURR CASSELBERRY, ATTORNEY IN FACT,
&C., OWNER, AND FRANKLIN STELTZ, CONTRACTOR.**

The statement of claim under the act of June 17, 1887, P. L. 409, must be verified by affidavit or the lien will be stricken off. Such claim must be filed within thirty days from the time the last work was done by the claimant.

MOTION to strike off lien. No. 20, June T., 1893.

Wanger & Knipe, Esqs., for motion.

Franklin March, Esq., contra.

Opinion of the court by SWARTZ, P. J., December 4, 1893.

The claimants file their lien against a leasehold interest. They make their demand "against the building hereinafter mentioned erected upon a certain leasehold." They request the Prothonotary to file their lien "against the above mentioned and described improvements and upon the above mentioned and described lot or leasehold to the extent of the interest of Franklin Steltz, the tenant or lessee above named therein."

It is evident that the claim is based upon the act of Assembly approved June 17, 1887, P. L. 409. If not, then there is no authority for the lien, for we are not aware of any other act which authorizes the filing of a lien against such leasehold interest in the county of Montgomery.

Section second of the act of 1887 provides: "Every person entitled to a lien by the provisions of this act shall file in the office of the Prothonotary of the Court of Common Pleas of the county wherein said leasehold, lot or parcel of ground is located, within thirty days from the time the last work or labor was done, a statement of his claim or demand, verified by affidavit."

Section third of the act provides: "Every such debt as aforesaid shall be a lien as aforesaid for the period of thirty days after the last work shall be done, although no claim shall have been filed therefor, and no longer."

The claim before us is not verified by affidavit, and this alone is a sufficient ground to strike off the lien: *Gibbs vs. Peck*, 77 Penna. St. R., 86.

It is also clear that the claimant lost his lien by failure to file the statement within thirty days from the time the last work was done or material furnished.

Land and Improvement Co. vs. Johnson.

According to the bill of particulars the last material was furnished May 12, 1893. The lien was not filed until September 8, 1893.

The third section of the act provides for a lien for a period of thirty days, although no claim shall have been filed therefor, and no longer. The last work done refers to the work of the claimant and not to the completion of the building.

And now, December 4, 1893, the lien is stricken off.

IN EQUITY.

OGONTZ LAND AND IMPROVEMENT COMPANY VS. AMOS JOHNSON.

When the language making an exception or reservation in a deed is doubtful, it should be construed more favorably to the grantee.

A deed for a building lot contained a restriction that "all buildings upon said lots shall be erected not less than fifteen feet back from the fence line." *Held*, that the question as to whether a porch built in front of a house and beyond the fifteen-foot limit would be against the spirit and meaning of the reservation, would depend upon the manner of its construction. A porch does not necessarily convey the meaning of a "building."

MOTION for injunction. No. 7, October T., 1893.

Edward F. Kane, Esq., for plaintiff.

William F. Solly, Esq., for defendant.

Opinion of the court by WEAND, J., December 4, 1893.

The complainants sold to the respondent a lot of ground in Abington township subject to the restriction that "all buildings upon the said lots shall be erected not less than fifteen feet back from the fence line." In erecting his dwelling-house the respondent has complied with this condition; but he now proposes to build a porch in front of the dwelling within seven feet of the fence line. Plaintiffs ask for an injunction to restrain the building of the porch, and allege that it is a "building" within the meaning of the terms of the deed.

Whether a porch or piazza attached to a dwelling-house is a building or a constituent part of the dwelling, in our opinion depends upon the manner of its construction and the uses to which it is to

Title Insurance and Trust Co. vs. Paris et al.

be applied. If open, and used only for comfort and convenience, instead of a place to live in, it may be merely a covered entrance or ornamental approach; if enclosed, it may become as much a part of the main building as a kitchen or parlor. The evident intent of the grantors was to prevent the front yards of this and adjoining lots from being shut up by buildings, using the term in its ordinary sense as meaning a "house"; but we do not think it was intended to deprive the grantee from adding an open structure intended only for comfort or ornament, as porches are usually used. The evidence shows that the porch is to be open and of the ordinary kind. For the same reason it might be urged that the steps could not be covered or the eaves extended beyond the limit of fifteen feet.

In *Tench vs. Rothermel*, 4 Kulp, 110, it was said: "In whatever sense the term piazza is used, it does not convey the meaning of a building." When the language making an exception or reservation in a deed is doubtful, it should be construed more favorably to the grantee: *Richardson vs. Clements*, 89 Penna. St. R., 503. We think that the question as to whether a porch can be considered a violation of this particular reservation, must depend upon the particular facts of the case; and that the respondent, so far as the affidavits show, has not violated the spirit of the terms of the deed, or at least that the complainants have not shown such a clear right to the relief prayed for as to warrant an injunction at this stage of the case.

And now, December 4, 1893, the motion for an injunction is overruled.

REAL ESTATE TITLE INSURANCE AND TRUST COMPANY VS. LEWIS
PARIS AND WIFE.

Where the claimant describes the curtilage in his lien, a judgment and sale gives the purchaser title to the property so described, although the claim may cover more ground than is essential for the proper enjoyment of the building. The act of June 16, 1836, provides full protection for the parties interested.

Where the designation of the curtilage is not definite, by consent of the parties interested the extent of the curtilage may be determined in the ejectment proceeding between the owner and Sheriff's vendee under the sale on the lien.

MOTION and reasons for a new trial. No. 19, March T., 1893.

MOTION for judgment *non obstante veredicto*.

Title Insurance and Trust Co. vs. Paris et al.

C. Tyson Kratz, Esq., for plaintiff.

Henry U. Brunner, Esq., for defendants.

Opinion of the court by SWARTZ, P. J., December 4, 1893.

An examination of the proceedings of the trial before the jury satisfies us that the defendants have no just cause of complaint.

The evidence of any division of the lot prior to the commencement of the building was very slight. There was nothing upon the ground indicating to the material man that a portion of the lot only was to be devoted to building purposes.

We expressed an opinion upon this question before the jury, but we were careful to instruct the jury that the matter was for them. This was more favorable to the defendants than the evidence warranted, for it was not sufficient to go to the jury.

The jury found that the whole lot was necessary for the ordinary and useful purposes of the building. The facts and circumstances in evidence, we think, justified this finding. At least, the court could not withdraw this question from the jury.

The mechanics' lien was filed against the building and lot on Byberry avenue, on the west corner of Depot street. As there was but one lot located on these streets belonging to the defendant Weil when the building was commenced, it may be that the Sheriff was justified in treating the description as embracing the whole lot of 75 feet by 175 feet. The Sheriff advertised the whole lot and pretended to convey a deed for the same to the purchaser. Mrs. Paris had notice of this proceeding by the Sheriff, for she filed her petition asking the court to restrain the Sheriff from selling more than the thirty-three feet. This application was withdrawn without any action thereon by the court except the granting of a rule.

If the claim as filed described the whole lot, then the judgment on the lien embraced the whole lot, and the purchaser at the Sheriff's sale was protected by the judgment on the mechanics' claim and took title to the entire lot: *Harbach vs. Kurth*, 131 Penna. St. R., 177; *Imperial Refining Co.'s Appeal*, 149 Id., 139.

On the trial we held that the curtilage was not defined by the claimant in his lien, and that the Sheriff had no right to define it in his sale. This gave the defendant, in our view, the right to have the curtilage determined by the jury.

We may add, although not properly a part of this case, that further reflection convinces us that we were in error when we refused

to appoint commissioners to fix the curtilage upon the petition of Mrs. Paris. She, however, secured a full hearing upon this matter before the present jury, and we do not see how she was injured by our mistake, if it was a mistake.

The new trial is refused.

We reserved the question whether there is any evidence in this case to be submitted to the jury upon which the plaintiff is entitled to recover.

We did this because at the time we were of opinion that the plaintiff had not shown sufficient title; but the defendant, in his proof, established the fact that both parties derived title from the same person, who had been seized of the premises. This proof supplied the deficiency in plaintiff's evidence.

Whether in the ejectment proceedings we can determine the rights of the parties under the Sheriff's sale on the mechanics' lien, is perhaps not free from doubt. But it is unnecessary to raise this question, for each side to the controversy conceded the right to go into the matter upon the trial of the present issue. The plaintiff endeavored to show that under that sale the entire lot passed; and the defendant, on the contrary, offered his proofs to show that title to the thirty-three feet alone vested in the purchaser.

The ninth section of the act of June 16, 1836, provides the method of procedure where the curtilage is not fixed before sale of the property. The court upon application may award an issue to determine disputed facts.

While the issue before us was not awarded under said act, the parties to an issue under the act would be the present parties. No other person, by lien or otherwise, is interested in the controversy. The plaintiff succeeded to all the rights of the mechanics' lien creditor, and the defendant by conveyance succeeded to all the rights of the owner who built the house. The forty-two feet in controversy belong to one or the other, or the plaintiff owns part and the residue is in the defendant. We see no reason why the "disputed facts" may not be "determined" in the present proceeding.

And now, December 4, 1893, it is ordered that judgment be entered for the plaintiff and against the defendant upon the verdict of the jury, and the motion for judgment in favor of the defendant *non obstante veredicto* is overruled.

JOHN FRISHOLTZ VS. E. F. QUIGLEY.

On an appeal by defendant from the judgment of a justice of the peace judgment can not be taken against him for want of an appearance.

A rule of court provided that on the entry of an appeal by defendant, the plaintiff, having filed a statement and made due proof of service on the attorney of record of defendant, if there be any, might take judgment for want of a sufficient affidavit of defence, but made no provision for such judgment where there was no attorney of record. *Held*, that judgment could not be taken against the defendant who appealed and had no attorney of record.

MOTION to take off judgment. No. 93, October T., 1893.

Henry M. Tracy, Esq., for motion.

Henry M. Brownback, Esq., contra.

Opinion of the court by WEAND, J., December 4, 1893.

Plaintiff obtained judgment against defendant before a justice for a sum exceeding one hundred dollars. Defendant appealed and entered his appeal, but has no attorney of record. Plaintiff filed a statement, as required by rules of court, and took judgment for want of an appearance and for want of an affidavit of defence. Defendant moves to take off the judgment.

Under our rules of court prior to June 7, 1890, there was no provision for taking judgment by default for want of an affidavit of defence in cases of appeal from justices of the peace where the amount in controversy exceeded one hundred dollars: *Moore vs. Washington Hose Co.*, 5 Montg., 190; and in *Lentz vs. Sylvester*, Id., 71, we also held that the act of May 27, 1887, P. L. 271, so far as it refers to the statement to be filed and judgment by default, is not applicable to appeals from justices of the peace. In *Seidel vs. Hurley*, 1 Woodward, 352, it was held that on the entry of an appeal by defendant judgment could not be taken for want of an appearance. In order to provide for a speedy judgment in these cases a rule of court was adopted June 7, 1890, and under it a judgment has been entered against defendant for want of an appearance and also for want of an affidavit of defence. The defendant now moves to set aside the judgment as being improperly entered without authority and without notice to him, and this involves a construction of our own rules. The rule was intended to apply to two classes of cases. First, where the appeal was by the defendant; and secondly, where

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the plaintiff appealed. In the first class of cases the plaintiff, having first filed his statement, etc., and made due proof of the service, etc., on the attorney of record of the defendant, if there be any, can take judgment unless the defendant or some one for him shall file a sufficient affidavit of defence, etc.; *provided*, however, where no appearance has been entered of record for the defendant, and judgment has been entered against him, it may be taken off on application of any attorney of this court, accompanied by his affidavit, that he had been previously retained, etc. It will be observed that no provision is made for judgment for want of an appearance, but only for want of a sufficient affidavit, and that the rule does not even provide for the entry of a judgment for this reason except where the defendant has an attorney of record. It is true that it does provide for taking off a judgment against a defendant where no appearance has been entered for him. But how can it be removed unless there is some way designated by which it can be obtained; and the judgment being over one hundred dollars, where is the rule which allows a judgment to be entered for want of an appearance?

If it is argued that the proviso assumes that it can be entered, the inquiry arises, Upon what authority can it be entered? It is also argued that, having filed his own appeal, the defendant must be considered in court. If so, he appears for himself; and, having appeared, should have notice. No man, however, is compelled to employ an attorney in order to have his case adjudicated; and if we agree that the defendant was bound to notice our rule, we are of opinion that it did not contemplate that he should have judgment entered against him without notice. The rule evidently was intended to conform to the practice under the act of 1887, but does not reach its purpose.

And now, December 4, 1893, the rule to strike off the judgment is made absolute.

Orphans' Court of Montgomery County.

ESTATE OF HANNAH SMITH, DEC'D.

Where a will is admitted to probate and letters testamentary granted, the executor will not be required to give security merely because an issue has been awarded to test the validity of the will.

The will is still *prima facie* valid, and the executor named therein is entitled to have control of the assets.

An executor will not be required to give security merely because he is without means except such as he will obtain from the estate.

PETITION to require executor to give security.

Childs & Evans, Esqs., for rule.

Wm. F. Solly and Henry Freedley, Esqs., contra.

Opinion of the court by WEAND, J., December 4, 1893.

The will of Hannah Smith having been admitted to probate and letters testamentary granted to Walter Smith, the executor therein named, the next of kin of the decedent appealed from the decree of the Register, and the Orphans' Court directed an issue to determine whether Hannah Smith, at the time of the execution of said paper writing, was of sound and disposing mind, memory and understanding. The issue is yet undetermined. A petition has now been presented setting forth that said executor "is without means except such as he will obtain from said estate in case the said will be sustained; that he is without any business; and, as your petitioner believes, is living from the proceeds of the said estate," and asking that he be required to give security, etc.

The executor has filed an answer in part as follows: "That the allegations contained in said petition are untrue; that this respondent is not living from the proceeds of said estate nor in any wise wasting or mismanaging the same, but, on the contrary, he avers that he is well and faithfully preserving said estate to await the result of the issue now pending to determine the validity of the will of the said decedent, and has accounted in the office of the Register of Wills for his administration of the same."

The petitioners have taken no depositions to support the charges contained in their petition, and the only reason therefore for which the executor could be required to enter security is the pendency of

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the issue. But this in itself is not sufficient. The letters granted stand until revoked. "The respondent's right to letters testamentary was received not from any act of the Legislature but from the will of Mrs. Smith, and to these letters he was entitled without regard to his pecuniary circumstances. It is only after letters have been committed to an executor that the acts of March 29, 1832, and of May 1, 1861, become operative, and until that time the Orphans' Court had no jurisdiction either to control the issuing of letters to him or to compel him to give bail. After that time, for any of the causes specified in the act, and for none other, the court may dismiss him or require sureties for the proper administration of the estate committed to his charge": Harberger's Appeal, 98 Penna. St. R., 29.

The granting of the issue does not prevent the executor from having control of the assets of the estate. The will having been duly probated and passed upon by the Register is *prima facie* the proper will of the testatrix, and until revoked stands in full force. Unless other reasons are assigned, we have no authority to require security from the executor. His account has been filed, showing his administration and specifying what goods unsold remain on hand and where the money is deposited. This at least shows good faith up to this period of time.

And now, December 4, 1893, the rule to show cause is discharged.

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Ex. L. E. B.

